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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 94

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., PETITIONERS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 13, 1962
CERTIORARI GRANTED JUNE 4, 1962

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

No. 3749

Louisville and Nashville Railroad Company, - - Plaintiff,

v.

Brotherhood of Locomotive Engineers,
Serve H. J. Roadcup, General Chairman,
407-408 Republic Building,
Louisville, Kentucky;

Brotherhood of Locomotive Firemen and Enginemen,
Serve Jake Paschall, General Chairman,
910 Republic Building,
Louisville, Kentucky;

Order of Railway Conductors and Brakemen,
Serve L. G. Mulinix, General Chairman,
802 Hoffman Building,
Louisville, Kentucky;

Brotherhood of Railroad Trainmen,
Serve J. M. King, General Chairman,
807 Republic Building,
Louisville, Kentucky;

H. J. Roadcup, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union;

Jake Paschall, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union;

L. G. Mulinix, Individually, and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakemen, an unincorporated labor union;

J. M. King, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Railroad Trainmen, an unincorporated labor union, - - Defendants.

COMPLAINT.

The Louisville and Nashville Railroad Company, plaintiff above named, complains of the defendants and says:

(1) Plaintiff, Louisville and Nashville Railroad Company, is a Kentucky corporation, a common carrier engaged in intra-state and inter-state commerce by railroad and is subject to the laws of the United States in respect thereto as hereinafter set out.

(2) The defendant, H. J. Roadcup, is General Chairman of the Brotherhood of Locomotive Engineers representing all the Locomotive Engineers operating on the Louisville and Nashville Railroad Company's property, and he is a resident of Louisville, Kentucky, with his business address at 407-408 Republic Building, Louisville, Kentucky.

(3) Jake Paschall is General Chairman of the Brotherhood of Locomotive Firemen & Enginemen on the property of the Louisville and Nashville Railroad Company and is a resident of Louisville, Kentucky, with his place of business at 910 Republic Building, Louisville, Kentucky.

(4) L. G. Mulinix is General Chairman of the Order of Railway Conductors and Brakemen on the property of the Louisville and Nashville Railroad Company and is a resident of Louisville, Kentucky, with his place of business at 802 Hoffman Building, Louisville, Kentucky.

(5) J. M. King is General Chairman of the Brotherhood of Railroad Trainmen on the property of the Louisville and Nashville Railroad Company and is a resident of Louisville, Kentucky, with his place of business at 807 Republic Building, Louisville, Kentucky.

(6) The defendant, Brotherhood of Locomotive Engineers, is a national, unincorporated labor organization representing engineers throughout the property of the Louisville and Nashville Railroad Company, and is certified under the Railway Labor Act as a collective bargaining

representative for the engineers employed by plaintiff in the operation of its railroad. Plaintiff's employees represented by the Brotherhood of Locomotive Engineers are too numerous to name. The individual named as a defendant has a common interest with, can and does fairly and adequately represent all the members of the craft or class of the plaintiff's employees represented by the Brotherhood of Locomotive Engineers. The individual defendant named herein, H. J. Roadcup, is an employee of the plaintiff.

(7) The defendant, Brotherhood of Locomotive Firemen & Enginemen, is an unincorporated labor organization representing firemen and hostlers throughout the property of the Louisville and Nashville Railroad Company, and it is the bargaining agent for the firemen and hostlers employed by the plaintiff in the operation of its railroad. The plaintiff's employees represented by the Brotherhood of Locomotive Firemen & Enginemen, all of whom are joined as defendants herein are too numerous to name. The individual named as a defendant can and does fairly and adequately represent all the members of the crafts and classes of plaintiff's employees represented by the Brotherhood of Locomotive Firemen & Enginemen. The individual defendant, Jake Paschall, named herein is an employee of the plaintiff.

(8) The defendant, Order of Railway Conductors and Brakemen, is an unincorporated labor organization representing conductors and brakemen throughout the property of the Louisville and Nashville Railroad Company, and it is the bargaining agent for the conductors and brakemen employed by the plaintiff in the operation of its railroad. The plaintiff's employees represented by the Order of Railway Conductors and Brakemen, all of whom are joined as defendants herein, are too numerous to name. The individual named as a defendant can and does fairly and adequately

represent all the members of the crafts and classes of plaintiff's employees represented by the Order of Railway Conductors and Brakemen. The individual defendant, L. G. Mulinix, named herein is an employee of the plaintiff.

(9) The defendant, Brotherhood of Railroad Trainmen, is an unincorporated labor organization representing trainmen throughout the property of the Louisville and Nashville Railroad Company, and it is the bargaining agent for the trainmen employed by the plaintiff in the operation of its railroad. The plaintiff's employees represented by the Brotherhood of Railroad Trainmen, all of whom are joined as defendants herein, are too numerous to name. The individual named as a defendant can and does fairly and adequately represent all the members of the crafts and classes of plaintiff's employees represented by the Brotherhood of Railroad Trainmen. The individual defendant, J. M. King, named herein is an employee of the plaintiff.

(10) This action is an action for an injunction to restrain and enjoin defendants from engaging in a wrongful and unlawful strike or work stoppage on plaintiff's railroad. The wrongful acts and unlawful strike by the defendants, as hereinafter described, are designed to interrupt the interstate commerce and the operation of the plaintiff's railroad, and will cause irreparable injury to the plaintiff, to the various businesses and industries which depend upon the plaintiff's railroad in the day-to-day operation of their plants and the other employees of such businesses and industries.

(11) The jurisdiction of this Court is invoked and attaches under the Acts of Congress and statutes of the United States to-wit: the Railway Labor Act (45 U.S.C.A. Sec. 151, et. seq.); Interstate Commerce Act(49 U.S.C.A. Sec. 1, et seq.); and the Act of 1948 (28 U.S.C.A. Sec. 1331 and 1337). The amount involved in controversy exceeds

the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and cost.

(12) The plaintiff is a railroad organized and existing under the laws of the Commonwealth of Kentucky, having its principal office in Louisville, Kentucky, and is and was at all times mentioned herein a common carrier by rail. As such common carrier, plaintiff owns and operates a railroad as a common carrier in thirteen (13) states. It serves numerous and various industries and plants by furnishing to said industries and plants the materials vital for their operation. The plaintiff employs approximately 23,750 employees, and the investment of the plaintiff in its tracks, equipment and other physical property is in excess of $826,265,505.63.

(13) The plaintiff has a collective bargaining agreement on behalf of the class or craft of firemen and hostlers in its employ with the Brotherhood of Locomotive Firemen and Enginemen. A dispute arose between the Louisville and Nashville Railroad Company (hereinafter called the Railroad) and the Brotherhood of Locomotive Firemen and Enginemen concerning the claim of Fireman B. G. Humphries. Fireman Humphries was dismissed from the Railroad's service on March 31, 1956. Fireman Humphries was dismissed from the service on the charge of assaulting two employees on duty on February 15, 1956. Pursuant to the provisions of the collective bargaining agreement between the Railroad and the Brotherhood of Locomotive Firemen and Enginemen, the dispute was processed through the grievance procedure therein contained. Failing to reach an agreement, the dispute was submitted with the National Railroad Adjustment Board (First Division), Chicago, Illinois, on June 18, 1957. The National Railroad Adjustment Board rendered its decision May 14, 1958, making an award to the effect that the claim was sustained

with pay for time lost as the rule is construed on the property (Exhibit A).

(14) Pursuant to the award, Mr. Humphries was notified by the Railroad on May 14, 1958, that he could return to work as a locomotive fireman. Mr. Humphries replied that he would report later as he could not go to work as a fireman at that time, and he actually returned to the Railroad's service on June 10, 1958. It is contended by the Railroad that during the time Mr. Humphries was not working for it he had other employment and the amount he earned during that time should be credited against any sums due and owing to him from the Railroad for the time lost. A settlement could not be reached on the property. The award of the National Railroad Adjustment Board was as follows: "Claim sustained with pay for time lost as the rule is construed on the property." The Railroad's contention is that under the terms of the award the question was in what manner was the rule construed on the property concerning pay earned at other occupations while not in the employment of the Railroad. The Railroad then applied to the National Railroad Adjustment Board for an interpretation of its award.

(15) On December 17, 1958, the National Railroad Adjustment Board issued its interpretation (Exhibit B). In said interpretation the National Railroad Adjustment Board refused to interpret the award on the ground that the issue involved was not submitted to the Division for determination, and that the Board may not now determine a new issue in the guise of an interpretation of the issue formerly decided.

(16) The question of whether or not the sum due Mr. Humphries under the award should be credited with pay received while not in the employ of the Louisville and Nashville Railroad Company was then handled as a new

issue, and the grievance procedure of the agreement was followed on the property. Failing to reach an agreement, the dispute was submitted to the National Railroad Adjustment Board (First Division) by submission dated January 23, 1959, a copy of which is attached hereto as Exhibit C. The submission was docketed by the National Railroad Adjustment Board (First Division) and given a number L-1479 and acknowledged as received January 26, 1959. And the Brotherhood of Locomotive Firemen and Enginemen on behalf of Fireman Humphries was required to file within the time limit specified by the rules of the Board, February 25, 1959, its response to the submission (Exhibit D). To date, no response has been received by the Railroad to its submission, nor has the Railroad been informed that a response has been filed with the National Railroad Adjustment Board.

(17) This dispute has not been resolved by the National Railroad Adjustment Board (First Division) and said dispute is still pending before said Board, and said dispute is properly within the jurisdiction of said Board.

(18) Independent of and apart from the agreement, the Railway Labor Act imposes upon the defendants, and each of them, the affirmative duty to pursue and exhaust the administrative remedy available to the defendants under said Act which requires the orderly prosecution of said dispute before the National Railroad Adjustment Board, the only tribunal having jurisdiction under the Act to determine the merits of this dispute, and precludes a strike by the defendants to enforce this award.

(19) In the dispute between the Brotherhood of Locomotive Firemen and Enginemen, Fireman Humphries, and the Railroad, the other union defendants have no interest. There is a separate collective bargaining agreement between the carrier and each of the other defendant unions.

The other union defendants haye no dispute with the Railroad and are threatening to strike in sympathy with the Brotherhood of Locomotive Firemen and Enginemen without the following of the procedures outlined by the Railway Labor Act, or submitting their dispute, if any, to the National Railroad Adjustment Board, the only tribunal having jurisdiction.

(20) Notwithstanding the submission of the dispute between the Railroad and the Brotherhood of Locomotive Firemen and Enginemen concerning Humphries' claim to the National Railroad Adjustment Board, and notwithstanding the defendants' legal duty under the Railway Labor Act to pursue and exhaust the remedy of the National Railroad Adjustment Board, the defendants unlawfully did advise the National Mediation Board that their members and the classes and crafts represented by them would strike the Louisville and Nashville Railroad Company on February 13, 1959. Said telegram was relayed (February 10, 1959) by the National Mediation Board to the Louisville and Nashville Railroad Company, and a copy is made a part hereof as Exhibit E.

(21) On February 10, 1959, the Railroad responded by a telegram to the National Mediation Board (Exhibit F) that the dispute involved was under submission to the National Railroad Adjustment Board (First Division) as File No. L-1479 and that said strike would be illegal and in violation of the Railway Labor Act.

(22) On February 10, 1959, by wire from H. J. Roadcup, General Chairman of Brotherhood of Locomotive Engineers, Jake Paschall, General Chairman of Brotherhood of Locomotive Firemen and Enginemen, L. G. Mulinix, General Chairman of Order of Railway Conductors and Brakemen, and J. M. King, General Chairman of Brotherhood of Railroad Trainmen, the Railroad was informed that on

Friday, February 13, 1959, at twelve noon the employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen would jointly strike due to the carrier's insistence that outside earnings of Fireman Humphries must be deducted from any money due him under Award 18720. Said telegram is made a part hereof as Exhibit G.

(23) Said joint strike is in violation of the provisions of the Railway Labor Act contained in 45 U.S.C.A. Sec. 151, et seq. The threatened strike and work stoppage will interrupt interstate commerce and the operation of the plaintiff's railroad, notwithstanding that Congress has established compulsory machinery under the Railway Labor Act, whereby parties to a collective bargaining agreement are required to submit such disputes to the administrative procedures provided in the Railway Labor Act before resorting to self help.

(24) The defendants are in violation of the provisions of the Railway Labor Act in refusing to utilize the lawful process provided by that Act, and is also in violation of the Railway Labor Act by using its economic force to compel and coerce the plaintiff to meet their demands while the dispute is under submission before the National Railroad Adjustment Board.

(25) By reason of the foregoing, immediate and irreparable injury will result both to plaintiff and to the concerns which it serves unless the unauthorized and unlawful strike threatened by defendants is enjoined by this Court. Unless such unlawful strike or work stoppage is enjoined, plaintiff will suffer irreparable injury, loss or damage in that it will be unable to operate its tracks, equipment, plant and property, will be deprived of operating

revenues which amount to approximately $691,334.55 daily, will be compelled to embargo shipments and drastically curtail or eliminate its services in handling materials intended for the use of the United States for defense purposes and may substantially lose revenues and business to competing forms of transportation, resulting in the necessary abolishing of the positions of many of plaintiff's employees who may thereby lose their means of livelihood. If the unlawful strike or work stoppage continues, it will obstruct, hinder and delay the flow of interstate commerce over plaintiff's railroad and will deprive interstate shippers and consignees of essential facilities and transportation.

(26) Notwithstanding that the Louisville and Nashville Railroad Company has complied with every provision of the collective bargaining agreements between it and the Brotherhoods, and with every provision of the Railway Labor Act in handling the aforesaid dispute the defendants and the classes and crafts represented by them have threatened an immediate strike of all employees of the classes represented by them and have set as a date for said strike February 13, 1959.

(27) The said strike, if carried into effect, would paralyze the Louisville and Nashville Railroad Company's railroad operation and prevent the transportation of persons and property over it. The purpose of said strike is to force the Railroad, by the use of self help by the defendants and the employees of the Railroad represented by them, to settle this dispute without submitting such dispute to the National Railroad Adjustment Board and to force the Railroad to disregard its agreements and the compulsory processes of the Railway Labor Act, all of which is contrary to law.

It is the public policy of the United States, as stated in 45 U.S.C.A. 152 (First) of the Railway Labor Act that it should be the duties of all carriers, their officers, agents

and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or other operation of any carrier growing out of any dispute between the carrier and the employees thereof. An interruption of commerce or an interruption of the operations of the Louisville and Nashville Railroad Company by a strike or a stoppage, called, lead or participated in by defendants pending final and ultimate decision by the National Railroad Adjustment Board would constitute violation of said public policy. The first and primary purpose of the Railway Labor Act, as stated in General Purposes, 45 U.S.C.A. 151a(1) is: "To avoid any interruption to commerce or other operation of any carrier engaged therein". A strike on the Louisville and Nashville Railroad Company would interrupt commerce, and the operation of the plaintiff involved herein and would, therefore, violate the purposes of the Railway Labor Act.

(28) Plaintiff is informed and believes that this controversy does not involve a labor dispute within the meaning of the Norris-LaGuardia Act (29 U.S.C.A. Sec. 101, et seq.) either between plaintiff and defendants, or plaintiff and its employees, or otherwise. Plaintiff is informed and believes that if there is a labor dispute which gives rise to the strike or work stoppage, these acts are unlawful and in violation and defiance of the Railway Labor Act and that the Norris-LaGuardia Act has no application in the premises. Plaintiff has exhausted all its available remedies to prevent the strike threatened by defendants herein, but without success, and the unlawful strike or work stoppage will deprive the plaintiff of the opportunity to avail itself of the services of the National Railroad Adjustment Board, and the other

rights and benefits provided in said Act; and the National Railroad Adjustment Board will be prevented from exercising its duties and functions as provided by Congress in the Act.

Wherefore, the plaintiff prays that this Court issue a temporary restraining order forthwith and without notice, and a preliminary injunction to be made permanent on final hearing; enjoining and restraining the defendants, Brotherhood of Locomotive Engineers and H. J. Roadcup, General Chairman, Individually, and as representative of the members of the class and craft represented by the aforesaid union; Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, General Chairman, Individually, and as representative of the members of the class and craft represented by said union; Order of Railway Conductors and Brakemen and L. G. Mulinix, General Chairman, Individually, and as representative of the members of the class and craft represented by said union; and Brotherhood of Railroad Trainmen and J. M. King, General Chairman, Individually, and as representative of the members of the class and craft represented by said union; and all persons acting in concert or participating with them, jointly or severally, from:

1. In any manner impeding, obstructing, tampering or interfering with the business of the Louisville and Nashville Railroad Company;

2. Preventing or attempting to prevent by any species of intimidation, threats, force or coercion, any of the Louisville and Nashville Railroad Company's officers, agents, employees, representatives, and others having business with the Louisville and Nashville Railroad Company from entering, leaving and transacting business on its premises;

3. Picketing the premises of the Louisville and Nashville Railroad Company and from interfering with ingress

and egress from its premises, including delivery, unloading and dispatch of its rolling stock and other equipment, in, on, about and between the plants and premises of its customers, or from loitering or congregating at or near any approaches thereto or upon any public street or highway leading into or from any place the employees of the plaintiffs desire to enter or leave en route from or to said premises;

4. Ordering, inducing, attempting to induce, condoning, participating in, assisting or permitting any strike, slowdown, stoppage of work or interruption of the operation of Louisville and Nashville Railroad Company's railroad;

5. That the defendant unions, their appropriate officers, agents, servants and employees be directed forthwith to instruct, and to take all action as may be necessary to insure that such instructions are carried out; that all Louisville and Nashville Railroad Company's employees represented by the defendant unions continue their normal employment;

6. That plaintiff be granted such other and further relief as the case may require and as the Court shall deem proper.

(s) John P. Sandidge,
Woodward, Hobson & Fulton,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky,

(s) H. G. Breetz,
Louisville and Nashville Office Building,
908 West Broadway,
Louisville, Kentucky,
Attorneys for Louisville and Nashville Railroad Company.

Complaint

W. S. Scholl says that he is Director of Personnel of the Louisville and Nashville Railroad Company, and that the statements herein contained are true.

(s) W. S. Scholl.

Subscribed and sworn to before me by W. S. Scholl this 11th day of February, 1959.

My commission expires September 19, 1962.

(s) Mary Barbara Bryant,
Notary Public, Jefferson County,
Kentucky.

EXHIBIT A.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division
With Referee Mortimer Stone

Award 18 720
Docket 34 752

Parties to Dispute } Louisville and Nashville Railroad Company
Brotherhood of Locomotive Firemen and Enginemen

Statement of Claim: "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Art. 31."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Complaint

Claimant was dismissed from service on charge of assaulting two employes on duty on February 15, 1956. The first of those employes, although he had called the police and so reported immediately after the incident, denied at the investigation any assault on him beyond horseplay. The second testified supporting the charge of assault on him and this was met by denial by claimant. Apparently the only disinterested witness was Hostler Maddox, who was not available, and claimant's General Chairman requested delay of the investigation until he could be present. Notwithstanding, the investigation was set for February 28 on which date all other witnesses were heard.

Thereupon the General Chairman stated in the record that he wanted no action taken due to the fact that the only eye witness was not there and could not be located; that the Assistant Superintendent had requested that the investigation be held on the 28th, for personal reasons, and "I stated that we would have to hold the investigation and in the meantime we would try to locate Mr. Maddox . . .". Maddox returned and reported for duty on March 16 but his statement was not taken and on March 31st claimant was given notice of his discharge. The applicable rule required that such notice be given within ten days after the close of the investigation but an appended note thereto read: "It is understood that the investigation will not be considered as closed until the papers have been approved by the management". Carrier asserts that the papers were not approved until March 30. If the invesigation was closed when the statements were signed and witnessed on February 28, claimant was not given notice in apt time; if it was not closed until March 30 carrier was obligated to take the statement of Maddox which it failed to do.

Complaint

Award: Claim sustained with pay for time lost as the rule is construed on the property.

National Railroad Adjustment Board,
By Order of First Division,
Attest: (s) J. M. MacLeed,
Executive Secretary.

Dated at Chicago, Illinois,
this 14th day of May 1958.

JOINT ANSWER OF THE DEFENDANTS.

The defendants, Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Firemen and Enginemen; Order of Railway Conductors and Brakemen; Brotherhood of Railroad Trainmen; H. J. Roadcup, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union; Jake Paschall, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union; L. G. Mulinix, Individually, and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakemen, an unincorporated labor union; and J. M. King, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Railroad Trainmen, an unincorporated labor union, for answer to the complaint herein, state:

1. This Court is without jurisdiction or authority to grant the injunctive relief herein prayed for.

Joint Answer of the Defendants

2. The allegations of Paragraphs (1), (2), (3,) (4), (5), (6), (7), (8), (9), (12), (13), (14) and (22) of the complaint are admitted.

3. Defendants admit the allegations of Paragraph (10) that this action is for an injunction to enjoin defendants from engaging in an alleged wrongful and unlawful strike or work stoppage on the plaintiff's railroad, but they deny that the strike called by the Brotherhoods and temporarily enjoined by this Court was a wrongful or illegal one. The other allegations of Paragraph (10) are denied.

4. Defendants admit the allegations of Paragraph (11) of the complaint, except the allegation therein contained to the effect that the jurisdiction of this Court attaches under the Acts of Congress and the Statutes of the United States therein enumerated; and in respect of that allegation, the defendants state that under the facts hereinafter set out this Court has no authority under any of the statutes mentioned to grant the injunctive relief herein sought.

5. Defendants deny the allegations of Paragraph (15) of the complaint that on December 17, 1958, the National Railroad Adjustment Board issued its interpretation of its award issued on May 14, 1958, as alleged in Paragraph (13) of the complaint; and in this respect, as hereinafter will be more fully shown, they state that the ruling of the National Railroad Adjustment Board referred to in Paragraph (15) of the complaint was not an interpretation of that award.

6. They deny the allegations of Paragraphs (16), (17), (18), (19), (20), (23), (24), (25), (26) and (28).

7. Defendants are without knowledge or information upon which to form an opinion as to the truth of Paragraph (21) of the complaint.

8. They admit the allegation of Paragraph (27) of the complaint that the strike temporarily enjoined by this

Court, if carried into effect, will paralyze the plaintiff's railroad operations and prevent the transportation of persons and property over it. They admit that the public policy of the United States, as set out in the Railway Labor Act, is correctly alleged in Paragraph (27), but they deny that under the facts in this case, which hereinafter will be more particularly pleaded, the action of the defendants constitutes a violation of that statute or a disregard of the public policy announced therein. The other allegations of Paragraph (27) are specifically denied.

9. All of the allegations of the complaint not herein specifically admitted are denied.

10. For further and affirmative answer, the defendants state:

(a) On March 31, 1956, without just cause therefor, B. G. Humphries, a member in good standing of the defendant, Brotherhood of Locomotive Firemen and Enginemen, was discharged by the plaintiff from his job as locomotive fireman on the Louisville Main Stem, First Division, of the plaintiff's railroad line. Humphries lodged a protest with his union, the Brotherhood of Locomotive Firemen and Enginemen, and the said defendant Brotherhood then took up with the railroad the complaint and demanded the reinstatement of Humphries to his job and compensation for time lost, and the complaint thus specified was processed through the grievance procedure contained in the collective bargaining agreement between the plaintiff railroad and the defendant, Brotherhood of Locomotive Firemen and Enginemen. On May 11, 1956, the plaintiff railroad refused to reinstate Humphries or to compensate him for time lost as a result of its illegal action in discharging him.

(b) Following a threat on the part of the defendant, Brotherhood of Locomotive Firemen and Enginemen, to call a strike of its members employed on the plaintiff's railroad

line, the plaintiff, without previous notice either to Humphries or to the defendant, Brotherhood of Locomotive Firemen and Enginemen, filed a submission of the controversy involved in the complaint of Humphries with the National Railroad Adjustment Board, First Division. From the time that Humphries' complaint was asserted, and while same was being processed under the terms of the collective bargaining agreement between the plaintiff railroad and the defendant Brotherhood of Locomotive Firemen and Enginemen, and at the time the submission was filed with the National Railroad Adjustment Board, the plaintiff railroad knew that there was involved in the complaint of Humphries not only restoration to his former position but also compensation for time lost. Nevertheless, in that submission, the plaintiff railroad made no claim that if Humphries should be reinstated and pay for lost time ordered the lost time pay should be credited by outside earnings of Humphries while unjustly held out of his job, and the plaintiff railroad also knew that Humphries had been gainfully employed for a considerable portion of the time he was deprived of his job, but those facts were not set out in the submission record in any form by the plaintiff railroad company.

(c) In view of these facts and the facts hereinafter set out, the defendants allege that the submission by the plaintiff was not made in good faith with the intention on its part to abide by the award of the National Railroad Adjustment Board if adverse to it, but primarily for the purpose of being able to point to the fact that the Humphries controversy was before the National Railroad Adjustment Board as a basis for securing an injunction against the strike so long as the Humphries complaint was before the Board on the plaintiff railroad's submission.

(d) On May 14, 1958, the Board entered an award against the plaintiff railroad sustaining the complaint of Humphries in the following language:

"Claim sustained with pay for time lost as the rule is construed on the property."

Although there had never been in force any rule on the plaintiff's property recognized by the plaintiff railroad and the Brotherhoods that pay for time lost should be credited by outside earnings of the aggrieved employee, nevertheless, following the award of the Board, and upon demand of the defendant, Brotherhood of Locomotive Firemen and Enginemen, that plaintiff comply therewith, the plaintiff railroad company refused to pay Humphries for time lost unless he would submit to crediting his pay for lost time with the amount of outside earnings he received during the period he was unjustly deprived of his job by the plaintiff.

(e) Inasmuch as the attitude of the plaintiff railroad with reference to deducting outside pay would vitally affect all of the members of the four defendant Brotherhoods employed by the plaintiff railroad, and in accordance with an agreement of the four Brotherhood defendants to cooperate in all complaints in respect to the application of awards by the First Division of the National Railroad Adjustment Board, the proper officials of the defendant, Brotherhood of Firemen and Enginemen, called upon the proper officials of the other defendant Brotherhoods to join them in a conference with the plaintiff railroad in an effort to induce the plaintiff to recede from its unjustified position and comply with the Board's award. Such a conference was held on July 30, 1958, and on August 9, 1958, the plaintiff railroad advised the defendant Brotherhoods that it proposed to stand by its unilateral interpretation of the award.

(f) Shortly thereafter, the Brotherhoods submitted in the manner provided by their respective constitutions the question of whether or not a strike would be authorized as a protest against the action of the plaintiff railroad and for the purpose of enforcing the award. The authority for such a strike was granted, same to be called at such time as might be fixed by the proper authorities of the Brotherhoods, and this fact was well known to the plaintiff railroad.

(g) Shortly after authority for the strike was granted, under the pretense of seeking an interpretation of the award of May 14, 1958, but for the real purpose of being in a position to enjoin any strike that might be called on the ground that the labor dispute in respect of which the strike was called was pending before the National Railroad Adjustment Board, the plaintiff railroad filled another submission on September 23, 1958, professing to seek an interpretation of the award of May 14, 1958.

(h) The National Railroad Adjustment Board, First Division, on December 17, 1958, refused to give any interpretation of the award on the ground that under its rules to do so would be to determine a new issue, the facts of which were not presented at the time the award was made.

(i) Following the refusal of the Board to make the interpretation purportedly desired by the plaintiff railroad, the representatives of the four Brotherhoods held a conference with plaintiff's railroad management on January 23, 1959, and again demanded that the plaintiff railroad pay Humphries for lost time without any deduction for outside earnings, but this demand was peremptorily rejected by the plaintiff railroad.

(j) On the same day that the plaintiff railroad rejected the demand of the defendant Brotherhoods, as set

out in the preceding paragraph, the plaintiff railroad prepared and mailed to the National Railroad Adjustment Board, First Division, a submission purportedly of a new issue, but in fact exactly the same issue as was involved in, but not presented in the original submission which resulted in the award of May 14, 1958.

(k) At the time the first submission was made by the plaintiff railroad which resulted in the award of May 14, 1958, at the time the Board rejected the plaintiff railroad's submission purportedly seeking an interpretation of the award, and at the time the third submission was filed by the plaintiff railroad with the Board, as herein alleged, there was in force a rule of the First Division of the Board to the effect that a party to a controversy before the Board could not split up the issues into more than one submission, and this fact was well known to the plaintiff railroad company. The question of pay for lost time, and how that lost time pay should be computed in event the complaining employee was ordered reinstated, including the right of the plaintiff railroad to deduct from pay for lost time the employee's interim outside earnings, were inherent parts of the case before the Board on the first submission, and this fact the plaintiff railroad well knew at the time it filed each of its submissions.

(l) On February 9, 1959, in conformity with the strike vote of the four Brotherhoods and in compliance with the constitution of the Brotherhoods, the proper officers of each called a strike of the membership of the Brotherhoods employed on the plaintiff railroad's property to begin on February 13, 1959; and on February 10, 1959, the Brotherhoods by telegram of that date notified the plaintiff railroad that the strike had been called for February 13, 1959, as the plaintiff railroad well knew would be done.

(m) On February 12, 1959, the plaintiff railroad procured from this Court the temporary restraining order which, by agreement, pending this hearing has been entended as a preliminary injunction.

(n) Plaintiff's complaint alleges only one substantial ground for the relief which it sought and which to this date it has obtained, and that is that the Brotherhoods could not legally conduct a strike when the labor controversy in respect of which the strike was called was then pending before the National Railroad Adjustment Board. The third submission of the Humphries controversy on January 23, 1959 was not a good faith submission. It was submitted in full knowledge of the fact that if the Board adhered to its rule which had been in force for a number of years it would be rejected for the reason that it represents an attempt on the part of the plaintiff railroad to present a portion of the controversy necessarily involved in the submission which resulted in the award of May 14, 1958 as a new issue, and that such practice of splitting up a controversy involved in a submission into a separate submission under the guise of involving a new issue is prohibited by the rules of the Board. The submission was for the vicious and fraudulent purpose of imposing upon the jurisdiction of this Court in order that the plaintiff railroad might secure a temporary restraining order to defeat a strike called solely because of the plaintiff's refusal to comply with the plain provisions of an award entered by the National Railroad Adjustment Board on a submission by the plaintiff itself.

(o) For the reasons herein stated, defendants charge that the contention of the plaintiff railroad that this Court had the authority to issue the restraining order and the preliminary injunction heretofore issued was not in good faith because the plaintiff knows that under the rules of the

National Railroad Adjustment Board there is now pending no controversy within the meaning of the law that authorizes this Court to enjoin the calling of a lawful strike.

Wherefore, premises considered, defendants ask that the temporary restraining order and the preliminary injunction be dissolved; that the plaintiff's complaint be dismissed; that they recover from plaintiff their costs herein expended, and for all other relief to which they may appear entitled.

Chas. I. Dawson,
Robert S. Dorsey,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Defendants.

Bullitt, Dawson & Tarrant,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,

Harold C. Heiss
Keith Building,
Cleveland 14, Ohio,

V. C. Shuttleworth,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa,

Weyland K. Sullivan,
Standard Building,
Cleveland 14, Ohio,

Harold McLaughlin,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel for Defendants.

I acknowledge receipt of two copies of the above answer this March 20, 1959.

Attorney for Plaintiff.

MOTION OF DEFENDANTS TO DISSOLVE TEMPORARY INJUNCTION ISSUED HEREIN ON FEBRUARY 12, 1959.

The defendants, Brotherhood of Locomotive Engineers, et al., move the Court to dissolve the temporary injunction issued in this case on February 12, 1959, and as grounds therefor they state:

The order of this Court entered on May 19, 1959 passed the hearing of this case to January 4, 1960, in order that the First Division of the National Railroad Adjustment Board might have an opportunity to dispose of the plaintiff Railroad's submission to that Board involving the claim of B. G. Humphries, and also continued the temporary injunction theretofore granted in full force and effect until further order of the Court.

Since the entry of that order, and on December 9, 1959, the First Division of the National Railroad Adjustment Board entered an order finally disposing of that submission by dismissing same for the reasons therein stated. A copy of that order is filed herewith as a part hereof marked Exhibit A.

Inasmuch as the temporary injunction was granted and continued in full force and effect because of the pendency of said submission before the First Division of the National Railroad Adjustment Board, and inasmuch as that submission has been disposed of, the provisions of the Norris-LaGuardia Act prohibit the continuance in force of the temporary injunction.

Furthermore, the plaintiff Railroad has not presented to the Court any reasons, and there are no other reasons, for granting the temporary injunction except the pendency

of the submission before the First Division of the National Railroad Adjustment Board.

Chas. I. Dawson,
Robert S. Dorsey,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Defendants.

Bullitt, Dawson & Tarrant,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,

Harold C. Heiss,
Keith Building,
Cleveland 14, Ohio,

V. C. Shuttleworth,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa,

Weyland K. Sullivan,
Standard Building,
Cleveland 14, Ohio,

Harold McLaughlin,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel for Defendants.

AMENDMENT TO THE COMPLAINT.

Plaintiff, leave of Court being first had and obtained, amends its complaint by reaffirming each and every allegation contained therein and, in addition, amends its complaint in the following paragraphs as follows:

(18) Independent of and apart from the agreement, the Railway Labor Act imposes upon the defendants, and each of them, the affirmative duty to pursue and exhaust the administrative remedy available to the defendants under said Act which requires the orderly prosecution of said dispute before the National Railroad Adjustment Board, the only tribunal having jurisdiction under the Act to determine the merits of this dispute, and precludes a strike by the defendants to enforce this award.

Moreover, pursuant to 45 U.S.C.A. 153 First (p), Humphries' and the defendants' exclusive remedy for the enforcement of this award (Exhibit A) is the filing in the District Court of the United States in which said Humphries resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which relief is claimed, and the order of the Division of the Adjustment Board in the premises. Said Statute provides that said suit shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the Courts of the United States. If the petitioner shall prevail, he shall be allowed a reasonable attorney's fee, to be taxed and

collected as part of the costs of the suit. Said remedy, pursuant to the Railway Labor Act, is the exclusive remedy for the enforcement of this award of the Adjustment Board and precludes a strike by the defendants to enforce this award. The strike of the defendants is to enforce this award. See telegrams—Exhibits E and G.

(23) Said joint strike is in violation of the provisions of the Railway Labor Act contained in 45 U.S.C.A. Sec. 151, et seq. The threatened strike and work stoppage will interrupt interstate commerce and the operation of the plaintiff's railroad, notwithstanding that Congress has established compulsory machinery under the Railway Labor Act, whereby parties to a collective bargaining agreement, in lieu of resorting to self help, are required to submit said disputes to the administrative procedures and judicial enforcement proceedings provided by the Railway Labor Act (45 U.S.C.A. 153).

(24) The defendants are in violation of the provisions of the Railway Labor Act in refusing to utilize the lawful processes provided by that Act and are also in violation of the Railway Labor Act by using their economic force to compel and coerce the plaintiff to meet their demands while the dispute is under submission before the National Railroad Adjustment Board.

In the alternative the defendants are in violation of the provisions of the Railway Labor Act as set forth in 45 U.S.C.A. 153 First (p) in refusing to utilize the lawful processes provided by the Act for the enforcement of award No. 18720 of the Adjustment Board in that neither the defendants nor Humphries have filed in any United States District Court for the district in which Humphries resides, or in which the plaintiff Railroad has its principal operating office, or through which the plaintiff Railroad operates, a petition setting forth Humphries' claim for relief and the

order of the Adjustment Board which is sought to be enforced. Said lawful process for the enforcement of this award as set forth in 45 U.S.C.A. 153 First (p) is the exclusive remedy for the enforcement of this award and it is in violation of the provisions of the Railway Labor Act that this strike has been called to enforce this award.

(27) The said strike, if carried into effect, would paralyze the Louisville and Nashville Railroad Company's railroad operation and prevent the transportation of persons and property over it. The purpose of said strike is to force the Railroad, by the use of self help by the defendants and the employees of the Railroad represented by them, to settle this dispute without submitting such dispute to the National Railroad Adjustment Board and without Humphries', or the defendants on his behalf, complying with the provisions of 45 U.S.C.A. 153 First (p) by filing a petition in the proper United States District Court for the enforcement of this award, thereby to force the Railroad to disregard its agreements and the compulsory processes of the Railway Labor Act, all of which are contrary to law.

It is the public policy of the United States, as stated in 45 U.S.C.A. 152 First of the Railway Labor Act that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or other operation of any carrier growing out of any dispute between the carrier and the employees thereof. An interruption of commerce or an interruption of the operations of the Louisville and Nashville Railroad Company by a strike or a work stoppage, called, led or participated in by the defendants pending decision by the National Railroad Adjustment

Board and pending final order of the United States District Court in enforcement proceedings of an award pursuant to 45 U.S.C.A. 153 First (p) would constitute violation of said public policy. The primary purposes of the Railway Labor Act, as stated in General Purposes, 45 U.S.C.A. 151a are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The strike on the Louisville and Nashville Railroad Company would interrupt commerce, and the operation of the plaintiff involved herein and would, therefore, violate the purposes of the Railway Labor Act.

(28) Plaintiff states that this controversy does not involve a labor dispute within the meaning of the Norris-LaGuardia Act (29 U. S. C. A. Sec. 101, et seq.) either between plaintiff and defendants, or plaintiff and its employees, or otherwise. If there is a labor dispute which gives rise to a strike or work stoppage, which acts are unlawful and in violation and defiance of the Railway Labor Act, the Norris-LaGuardia Act has no application in the premises. Plaintiff has exhausted all its available remedies to prevent the strike threatened by defendants herein, but without success, and the unlawful strike or work stoppage will deprive the plaintiff of the opportunity to avail itself of the services of the National Railroad Adjustment Board and from the protection and other rights provided by the Act in 45 U.S.C.A. 153 which gives an exclusive remedy to Humphries and the defendants under the Act and protects the Railroad from strikes concerning minor disputes; unless

such strike action is prevented, the National Railroad Adjustment Board will be prevented from exercising its duties and functions as provided by Congress in the Act and the Courts of the United States will be deprived of jurisdiction and prevented from exercising their duties and functions as provided by Congress in said Act as contained in 45 U.S. C.A. 153 First (p).

Wherefore, the plaintiff prays as in its original complaint.

(s) John P. Sandidge,
Woodward, Hobson & Fulton,
1805 Kentucky Home Life Building,
Louisville, Kentucky,
H. G. Breetz,
Louisville and Nashville Office Building,
908 West Broadway,
Louisville, Kentucky,
Attorneys for Louisville and Nashville Railroad Company.

W. S. Scholl says that he is Director of Personnel of the Louisville and Nashville Railroad Company, and that the statements herein contained are true.

.....
W. S. Scholl

Subscribed and sworn to before me by W. S. Scholl this .... day of December, 1959.

My commission expires .....

.....
Notary Public, Jefferson County, Kentucky.

DEFENDANTS' ANSWER TO AMENDMENT TO COMPLAINT.

The defendants, by way of Answer to the Amendment to the Complaint filed herein, deny each and all of the allegations of fact contained in the Amendment to the Complaint and each and all alleged facts stated therein in the form of conclusions of law, except they admit the allegation of Paragraph (27) that "the said strike, if carried into effect, would paralyze the Louisville and Nashville Railroad Company's operation and prevent the transportation of persons and property over it."

Wherefore, having fully answered, defendants pray as is their original Answer.

Chas. I. Dawson,
1700 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Defendants.

Bullitt, Dawson & Tarrant,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,
Harold C. Heiss & Russell B. Day,
Keith Building,
Cleveland 14, Ohio,
V. C. Shuttleworth,
1120 Merchants Nat'l Bank Building,
Cedar Rapids, Iowa,
Weyland K. Sullivan,
Standard Building,
Cleveland 14, Ohio,
Harold McLaughlin,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel for Defendants.

CERTIFICATE OF SERVICE.

Chas. I. Dawson, one of counsel for defendants, states that a copy of the foregoing Answer was mailed to:

Mr. John P. Sandidge
Woodward, Hobson & Fulton
1805 Kentucky Home Life Building
Louisville 2, Kentucky

and

Mr. H. G. Breetz
Louisville and Nashville Office Building
908 West Broadway
Louisville, Kentucky

Counsel for plaintiff, Louisville and Nashville Railroad Company, this May 31, 1960.

.....

Chas. I. Dawson

AFFIDAVIT OF JAKE PASCHALL.

Affiant, Jake Paschall, states that he is a citizen and resident of Louisville, Jefferson County, Kentucky; that he is now, and for seven years has been, the General Chairman (L&N System) of the Brotherhood of Locomotive Firemen and Enginemen; and, among his other duties, he represents his Brotherhood in negotiating contracts with the L&N System covering wages and working conditions, and he also represents his Brotherhood and the members thereof in adjusting grievances growing out of the interpretation and meaning of wage and working condition contracts. He is entirely familiar with the entire history of the controversy between the L&N Railroad and his Brotherhood in respect of the discharge and the rein-

statement of B. G. Humphries, a member of his Brotherhood and a fireman employed on the L&N System, and in respect of the controversy between the Brotherhood and the Railroad Company as to the manner in which the Railroad Company proposes to comply with the award of pay for lost time given to Humphries by the First Division of the National Railroad Adjustment Board. Those facts are as follows:

On March 31, 1956, B. G. Humphries was discharged by the Railroad Company on the ground that he had assaulted two other Railroad Company employees while on duty. On behalf of Humphries, the Brotherhood protested his discharge, and, as provided in the contract between the Brotherhood and the Railroad Company, the matter was processed to and through the highest officer of the Railroad Company designated to handle such matters, but without any agreement or any adjustment of the grievance being effected. The processing of the complaint through the regular channels provided for in the contract consumed a period of something like a year, but when it finally became evident to the officers of the Brotherhood that the Railroad Company had no intention of adjusting the grievance by restoring Humphries to his position and paying him for the time he had been required to lose, a strike vote was taken by the Brotherhood, in accordance with the provisions of its charter, which vote authorized the calling of a strike on account of the Humphries grievance.

With full knowledge that a strike had been authorized, and, as Affiant believes, for the purpose of averting the strike, on June 13, 1957, the Railroad Company filed with the First Division of the National Railroad Adjustment Board its ex parte submission "In the Claim of the Brotherhood of Locomotive Firemen and Enginemen described as follows: Request that Fireman B. G. Humphries, Louisville Main Stem, First Division, be reinstated to service with

former senority unimpaired and paid for all time lost under Article 31." The submission incorporated the Railroad Company's conception of the facts, but it did not submit to the National Railroad Adjustment Board the question of whether or not, in event the Board awarded Humphries reinstatement with pay for lost time, the amount of that pay was subject to reduction by the amount which Humphries might earn from other sources while laid off from his job, although it was competent for that question to have been incorporated in that submission, and had it been so submitted, the National Railroad Adjustment Board had the authority and the jurisdiction to decide same.

The Brotherhood responded to the submission of the Railroad Company by submitting to the Board what the Brotherhood claimed to be the facts. The only question submitted to the Board was whether Humphries was wrongfully discharged and if he should be restored to his job with pay for lost time.

On May 14, 1958, the Board disposed of the submission by Award No. 18,720, which reads as follows:

> "Claim sustained with pay for time lost as the rule is construed on the property."

On the same day, an order was entered by the First Division of the National Railroad Adjustment Board, directing that its award be complied with on or before June 14, 1958.

The Railroad Company complied with that portion of the award directing the reinstatement of Humphries, but did not pay him for time lost.

On May 16, 1958, this Affiant, as General Chairman (L&N System) of his Brotherhood, wrote a letter to W. S. Scholl, Director of Personnel, Louisville & Nashville Railroad Company, and the person who had the authority to represent the Railroad Company in such matters, urging

that the award be complied with not later than June 14, 1958.

In reply to that letter, Scholl wrote this Affiant a letter dated May 17, 1958, in which he made it clear that his principal, the Railroad Company, did not propose to pay for time lost unless Humphries and the Brotherhood would agree to a deduction from the total of the wages for time lost whatever sums Humphries had earned from other sources.

On May 20, 1958, Affiant responded to Scholl's letter of May 17, in which Affiant advised Scholl that it was the position of the Brotherhood that the Railroad Company was not entitled under Rule 31(f) to deduct from the amount of wages Humphries would have earned but for his discharge any sums he may have earned at other work during the time he was laid off, and that the Brotherhood would not consent to any such construction of the award as that insisted on by the Railroad.

Scholl replied to Affiant's letter last referred to, his letter being dated June 26, 1958, and he continued to insist that the Railroad Company had the right under the rule "as construed on the property" to deduct earnings of Humphries from outside employment, and made it clear to this Affiant that the Railroad's construction of that rule would be followed in settling awards to all employees, whether members of Affiant's Brotherhood or members of other Brotherhoods employed by the L&N. H. J. Roadcup, General Charman (L&N System) of the Brotherhood of Locomotive Engineers; L. G. Mulinix, General Chairman (L&N System) of the Order of Railway Conductors and Brakemen; and N. E. Lane, General Chairman (L&N System) of the Brotherhood of Railroad Trainmen each received a copy of that letter.

Affiant felt that the expressed intention of the Railroad Company to make deductions of outside earnings in the settlement of the Humphries award, if carried out, would violate the provisions of Article 31(f) of the contract between the Railroad Company and Affiant's Brotherhood, and that, therefore, not only the members of his Brotherhood but also the members of the Brotherhood of Locomotive Engineers, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen, which orgainzations had separate contracts with the Railroad Company, each containing a clause substantially identical to Article 31(f) of the contract of Affiant's Brotherhood, were vitally interested in the issue presented by the attempt of the Railroad Company to make such deduction in the Humphries case. Affiant, therefore, notified the respective General Chairmen (L&N System) of those organizations of the position which the Railroad Company was taking and requested that they join him in an effort to induce the Railroad Company to comply with the Humphries award without making deduction of outside earnings, and to induce the Railroad Company to agree that no such deduction was authorized by Article 31(f) of the contract between Affiant's Brotherhood and the Railroad Company.

The General Chairmen (L&N System) of the other three organizations above mentioned agreed to cooperate in an attempt to accomplish the purpose above set out, and a meeting was arranged to be held on July 7, 1958, at the office of the Railroad Company in Louisville, Kentucky, between Affiant and the three other General Chairmen (L&N System) herein referred to, and Mr. J. B. Clark, Assistant Director of Personnel of the L&N, and Mr. William Wallace, Assistant to the Director of Personnel, the latter two having been designated to represent the Railroad Company at that conference.

Affidavit of Jake Paschall

The conference was held as scheduled on July 7, 1958. There were present, as above stated, Mr. Clark and Mr. Wallace, as representatives of the Railroad Company, this Affiant, as General Chairman (L&N System) of the Brotherhood of Locomotive Firemen and Enginemen; H. J. Roadcup, General Chairman (L&N System) of the Brotherhood of Locomotive Engineers; L. G Mulinix, General Chairman (L&N System) of the Order of Railway Conductors and Brakemen; and N. E. Lane, General Chairman (L&N System) of the Brotherhood of Railroad Trainmen. All of the General Chairmen urged the representatives of the Railroad Company that the latter's interpretation of the contract provision above referred to and of the award was wrong and that the Railroad Company should recede from its position. The representatives of the Railroad Company insisted, however, that the Railroad had the right to demand such deduction and that, henceforth, it proposed to make such deductions in the payment of the awards of the National Railroad Adjustment Board made to any member of any of the union organizations represented at that conference.

Following that conference, and because of the questions involved, each of the General Chairmen (L&N System) requested the head of his respective organization to assign some one from the general office to assist in further negotiations with the Railroad Company in respect of the matter, and this was done, the next conference being held on July 30, 1958.

At the conference of July 30, 1958, the Railroad Company was represented by Mr. Scholl, Director of Personnel, and by the two gentlemen above referred to who represented the Railroad Company at the conference on July 7. The representatives of the four unions at that conference were this Affiant and W. E. Mitchell, Vice President of the

Brotherhood of Locomotive Firemen and Enginemen; H. J. Roadcup, General Chairman (L&N System) of the Brotherhood of Locomotive Engineers, and H. W. Haskins, Assistant Grand Chief of that Brotherhood; L. G. Mulinix, General Chairman (L&N System) of the Order of Railway Conductors and Brakemen, and T. M. Walters, Vice President of that organization; and N. E. Lane, General Chairman (L&N System) of the Brotherhood of Railroad Trainmen, and L. E. Chester, Vice President of that Brotherhood. Nothing came of that conference. However, the Railroad Company insisted on its alleged right to make the deduction of outside earnings, and declared its intention to make such deduction in settlement of the Humphries award and in settlement of all unsettled outstanding awards and in all future awards to any member of each of the four unions.

Following the unproductive conference on July 30, 1958, and on the same date, the union representatives, having despaired of being able to induce the Railroad Company to withdraw from its position, applied to the proper union authorities for permission to take a strike vote for the purpose of calling a strike to induce the Railroad Company to comply with the Humphries award without any deduction of outside earnings in accordance with the provisions of Article 31(f) of the contract between Affiant's union and the Railroad Company.

A strike vote was authorized, and a strike vote was taken by the different unions involved with the result that by October 1, 1958, the calling of the strike had been authorized by the membership of the different unions involved in the manner provided by their respective constitutions.

Following the conference of July 30, 1958, and apparently for the purpose of making perfectly clear the position of the Railroad Company with reference to the deduction of outside earnings in settlement of awards, the Rail-

road Company, under date of August 9, 1958, in a letter addressed to this Affiant, repeated its position with reference to the deduction of outside earnings which it had made known at the conference of July 30, 1958, and the General Chairman (L&N System) of each of the Brotherhoods hereinabove referred to receive a copy of that letter.

A copy of each of the letters hereinabove referred to dated May 16, 1958, May 17, 1958, May 20, 1958, June 26, 1958 and August 9, 1958 is filed herewith as a part of this Affidavit, marked respectively Exhibits A, B, C, D and E.

The Railroad Company was fully advised of the call for the strike vote hereinabove referred to, of the taking of the strike vote and of the result thereof as the vote progressed; and for the purpose of forestalling the strike which it knew was threatened, the Railroad Company, on September 23, 1958, filed with the First Division of the National Railroad Adjustment Board a submission entitled "First Division Award 18,720 Request For Interpretation," knowing that under the law so long as that submission was pending undisposed of the unions could be enjoined from striking. The submission purportedly stated the controversy between the Railroad Company and Affiant's Brotherhood in respect of the right of the Railroad Company in settling the Humphries award to deduct outside earnings, and the Railroad Company's argument in support of the right to make such deduction.

The Brotherhood of Locomotive Firemen and Enginemen, by letter of this Affiant dated November 14, 1958, addressed to the Executive Secretary National Railroad Adjustment Board, responded to the contention of the Railroad Company contained in its submission of September 23, 1958. In that response, it was pointed out that in the first submission, which resulted in the Humphries award of May 14, 1958, and in respect of which in the second sub-

mission of September 23, 1958 the Railroad Company was professing to seek an interpretation, the Railroad Company did not request an award giving to the Railroad Company the right to deduct outside earnings. Affiant further charged in the letter that there was no bona fide dispute between the Railroad Company and the Brotherhood representing Humphries as to the meaning or intent of the Humphries award, but that the Railroad Company was simply attempting to have the award changed in the guise of an interpretation. A copy of Affiant's letter of November 14, 1958 is filed herewith as a part hereof marked Exhibit F.

On December 17, 1958, the First Division of the National Railroad Adjustment Board rejected the request of the Railroad Company in its submission of September 23, 1958, for an interpretation of the award, and held that inasmuch as the right of the Railroad Company to deduct outside earnings of Humphries from any award was not raised in its first submission, any attempt to raise same in the second submission would not be permitted. A copy of that award is filed herewith as a part hereof marked Exhibit G.

A few days after December 17, 1958, on which date the First Division of the National Railroad Adjustment Board had disposed of the submission of the Railroad of September 23, 1958 above referred to, the taking of the strike vote of the four unions had been completed with the result that the strike was authorized. The Railroad Company had full knowledge of the result of that strike vote.

This Affiant and the General Chairman of the other three unions, who were cooperating with him in trying to induce the Railroad Company to recede from its position in respect of the deduction of outside earnings, hoped that following the action of the First Division of the National Railroad Adjustment Board on the September 23, 1958

submission of the Railroad Company, the Company would abandon its position with reference to its claimed right to deduct outside earnings in settling awards and that the controversy between the Railroad Company and the unions would be terminated. Therefore, no steps were taken for some time by the proper authorities of the unions to call the strike authorized as hereinabove set out. However, it soon became evident that the Railroad Company did not intend to recede from its position. In a last effort, however, to avoid a strike and secure a settlement of the controversy, this Affiant, for his Brotherhood, and the General Chairmen (L&N System) of the other three unions, who had been acting with him in respect of the controversy, arranged for a final meeting to be held with the representatives of the Railroad Company on January 23, 1959.

That meeting was held on January 23, 1959, the Railroad Company being represented by the same persons who represented it at the July 30, 1958 meeting hereinabove referred to, and the respective unions were represented by the same persons who represented them at the July 30, 1958 meeting, except that Mr. C. J. McClain, who had succeeded Mr. L. E. Chester as Vice President of the Brotherhood of Railroad Trainmen, and Mr. J. M. King, who had succeeded Mr. N. E. Lane as General Chairman (L&N System) of that Brotherhood, were present at the meeting in place of Mr. Chester and Mr. Lane. That meeting was barren of results, the Railroad Company still insisting that it was going to make deduction of outside earnings in settling the Humphries award and in the settlement of all other awards then unsettled and on all awards that might be thereafter made to members of the respective unions.

Anticipating that the unions would call a strike following that meeting, the Railroad Company had already prepared a third submission of the Humphries controversy,

consisting of thirteen typewritten pages, to the First Division of the National Railroad Adjustment Board, and that submission, according to the record, was filed with the Board in Chicago on the same date, January 23, 1959, and this Affiant received a copy on the following morning, January 24, 1959.

In the submission of January 23, 1959, the Railroad Company attempted to support the thesis that such submission presented a new issue which was not involved expressly or impliedly in either its first submission or its second submission hereinbefore referred to.

In an order entered December 9, 1959, the contention of the Railroad Company was denied, the Adjustment Board holding in effect that the award made on May 14, 1958 on the first submission finally disposed of the Humphries claim, and that the award, so far as the Board was concerned, was final. A copy of that order is filed herewith as a part hereof marked Exhibit H.

Following the meeting of January 23, 1959, and the filing by the Railroad Company of its third submission on that date with the First Division of the National Railroad Adjustment Board, this Affiant and the General Chairmen of the other three unions, who had been acting with him, and their international officers, who had been following the matter closely, agreed that the strike should be called immediately. The strike call was issued on February 9, 1959, to be effective February 13, 1959.

The Railroad Company, conceiving that the third submission gave it a basis for enjoining the strike called for February 13, 1959, notwithstanding the bad faith connected with that submission, on February 12, 1959, just one day before the effective date of the strike, filed in this Court a suit to enjoin the unions from putting into effect the strike on the ground that the controversy was allegedly then

pending, undisposed of, before the First Division of the National Railroad Adjustment Board, and, on the same date, the Railroad Company procured from Honorable Henry L. Brooks, Judge of this Court, a temporary restraining order against the union officials, enjoining and restraining them from putting into effect the said strike. That order set the case for hearing on a motion for a preliminary injunction on February 18, 1959, at 10:30 A. M.

On the hearing on February 18, 1959, it was perfectly apparent that inasmuch as the third submission of the Railroad Company to the First Division of the National Railroad Adjustment Board had not been disposed of, and inasmuch as the Judge of this Court had no authority to determine whether the submission was in good faith or not, he granted the preliminary injunction. As heretofore stated, the third submission of the Railroad Company was disposed of on December 9, 1959, and promptly thereafter the unions which are named as defendants in this suit filed a motion in this Court to dissolve that injunction because the basis upon which it was issued—namely, the alleged pendency of the controversy before the First Division of the National Railroad Adjustment Board—dissolved and disappeared when the Adjustment Board dismissed said third submission of the Railroad Company.

Affiant states that he and the General Chairman (L&N System) of the Brotherhood of Locomotive Engineers, the General Chairman (L&N System) of the Order of Railway Conductors and Brakemen and the General Chairman (L&N System) of the Brotherhood of Railroad Trainmen have felt, and they still feel, that the controversy with the Railroad Company involving the payment of the Humphries award was and is of vital importance to their respective unions because it was and is perfectly apparent to them that the Railroad Company was and is attempting in the

settlement of that award to violate a plain provision of their respective union contracts with the Railroad Company, none of which gives the Railroad Company the right in the settlement of awards such as the Humphries award to deduct the amount of outside earnings. They have felt, and now feel, that the Railroad Company, in attempting to deduct outside earnings in the settlement of the Humphries award, is in effect attempting a unilateral modification of its contracts with the respective unions. That such was and is the purpose of the Railroad Company is all the more apparent in view of the fact that in 1947, in the manner provided by the Railroad Labor Act, the Railroad Company undertook to modify that part of its contracts with Affiant's Brotherhood — the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Locomotive Engineers, the Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen, which provides what action the Railroad Company must take in event discipline administered to an employee is not sustained. The facts in respect of that attempt on the part of the Railroad Company are as follows:

Under date of June 20, 1947, the Railroad Company, by letter of that date addressed to Mr. J. N. Hatcher, General Chairman, Brotherhood of Locomotive Engineers; Mr. O. K. Pemberton, General Chairman, Order of Railway Conductors and Brakemen; L. E. Whitler, General Chairman, Brotherhood of Locomotive Enginemen & Firemen; and Mr. C. J. McClain, General Chairman, Brotherhood of Railroad Trainmen, notified the addressees that the letter of

> "our intention to change existing rules, regulations, interpretations or practices, however established, to the extent and as shown in attachment marked 'A'."

That notice was sent pursuant to the requirements of Section 6 of the Railway Labor Act, which deals with the procedure to be followed when either party to a railroad union contract covering wages and working conditions desires to make changes in such contract. Item 18 of "Attachment 'A'" which accompanied that letter, and in which the Railroad Company listed its proposed changes, in part, reads as follows:

"PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS

"Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due.

"For the purpose of this rule self-employment shall not be considered as 'other employment.'

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated."

On the same date, June 20, 1947, the General Chairmen (L&N System) of the unions, who were the addressees in the letter from the Railroad Company of that date, served notice, in accordance with Section 6 of the Railway Labor Act, of their desire to make certain changes in the contracts. Thereupon, a meeting was held between the representatives of the Railroad Company and the General Chairmen of the respective unions involved on July 14, 1947. At that conference, no agreement was reached as to any of the changes proposed by either party, and it was agreed that the matter should be referred to a National Conference Committee composed of representatives of interested railroads and representatives of the interested unions; and the matter was submitted to such Conference Committee for decision.

Affidavit of Jake Vaschall

Protracted hearings and sessions were held by the National Conference Committee with the result that on August 11, 1948, the unions and the railroads involved entered into a "Memorandum of Understanding" incorporating the changes in the contracts between the unions and the railroads involved which had been agreed upon by that National Conference Committee, but no change was agreed to or made as proposed and demanded by the Railroads in Item 18 of the Railroad Company's Section 6 notice dated June 20, 1947 hereinabove referred to. The final paragraph (Section 20) of that "Memorandum of Understanding" reached by the National Conference Committee is in the following language:

> "This agreement is in full and final settlement of the dispute growing out of notices served by the employees parties hereto and by the carriers parties hereto, on or about June 20, 1947, in accordance with Section 6 of the Railway Labor Act, of intended changes in agreements affecting rates of pay, rules and working conditions."

A copy of the "Synopsis of agreement made on August 11, 1948" by the National Conference Committee, and which includes a copy of the "Memorandum of Understanding" above referred to, is attached hereto as a part hereof, marked Exhibit I.

Since August 11, 1948, the date of that "Memorandum of Understanding," no change in the contracts between the Railroad Company and the unions here involved has been made providing that "where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due," as proposed by Item 18 of "Attachment 'A'" of the Railroad Company's Section 6 notice of June 20,

1947; and since the rejection of that proposed change on August 11, 1948 by the National Conference Committee, the Railroad Company has never attempted to secure any such change in its contracts with the unions here involved. However, in attempting to settle the Humphries award by deducting outside earnings, it is attempting illegally and unilaterally to work a change in the contract in keeping with the change it attempted to obtain under its Section 6 notice of June 20, 1947.

Affiant further states that at no time since the Railroad Company gave the Section 6 notice of June 20, 1947, or prior thereto, has there been any agreement between this Affiant's Brotherhood and the Railroad Company that Section 31(f) of the contract between the two should be construed to authorize the deduction of outside pay in the settlement of money awards; and the Railroad Company has never to the knowledge of this Affiant deducted any outside pay in the settlement with a member of Affiant's Brotherhood of such an award as that involved in the Humphries case; and in claiming the right to make the deduction in the settlement of the Humphries award, it is knowingly attempting to illegally and unilaterally work a change in the contract between Affiant's Brotherhood and the Railroad in keeping with the change it unsuccessfully attempted to obtain in its Section 6 notice of June 20, 1947.

This August 17, 1960.

Jake Paschall

Subscribed and sworn to before me by Jake Paschall this 17th day of August, 1960.

My commission expires December 3, 1960.

Notary Public, State-at-Large,
Kentucky.

Affidavit of Jake Paschall—Exhibit A

EXHIBIT A.

H-578-14

May 16, 1958

Mr. W. S. Scholl, Director of Personnel,
Louisville & Nashville Railroad Company,
908 W. Broadway,
Louisville 1 Kentucky

Dear Sir:

Award 18720, Docket 34752, NRAB, 1st Division:—Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Article 31.

We are now in receipt of the National Railroad Adjustment Board-First Division's Award No. 18720, Docket 34752, and the Board's order to the Louisville & Nashville Railroad Company dated May 14, 1958 in connection with the above Award and which is covered in your file L-306-9.

It is assumed that you will comply with this order promptly and not later than the time specified in the order.

Your further advice will be greatly appreciated.

Yours very truly,
Jake Paschall
General Chairman

JP:IED

Bld. Cys. O. E. Alexander, LC Lodge 578
H. T. Turner, RS, Lodge 578
B. G. Humphries, M-578

With copy of the Award and Order from the NRAB attached.

JP

Affidavit of Jake Paschall—Exhibit B

EXHIBIT B.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Office of Director of Personnel

Louisville 1, Kentucky

May 17, 1958

W. S. Scholl,
Director of Personnel

J. L. Davis,
J. B. Clark,
Asst. Directors of Personnel

H. R. Stewart,
W. G. Reckley,
J. O. Sullivan,
A. J. Stierstaedter,
Assts. to Director of Personnel

L-306-9

Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen & Enginemen,
Louisville, Kentucky.

Dear Sir:

This will acknowledge receipt of your letter of May 16th, file H-578-14, concerning Award 18720 of the First Division, National Railroad Adjustment Board, which orders Fireman Humphries restored to the service with pay for time lost as the rule is construed on the property.

Instructions are being issued today to cover Fireman Humphries' restoration to the service. A prompt check will also be made to determine his loss of wages during the period of his dismissal, and Mr. Humphries will be asked to furnish a statement of his earnings in outside employment during that some period. When these amounts are known we will be glad to confer with you as to what money payment is due Fireman Humphries under the Award.

Yours truly,

(s) W. S. Scholl
Director of Personnel

Affidavit of Jake Paschall—Exhibit C

EXHIBIT C. H-578-14

May 20, 1958

Mr. W. S. Scholl, Director of Personnel,
Louisville & Nashville Railroad Company,
908 W. Broadway,
Louisville 1, Kentucky

Dear Sir:

This will acknowledge your letter of May 17th, 1958, file L-306-9, with reference to the reinstatement of Fireman-Engineer B. G. Humphries with pay for time lost in accordance with Award 18720 of the First Division, National Railroad Adjustment Board.

You stated that instructions are being issued to cover his restoration to the service, that a prompt check will also be made to determine his loss of wages during the period of his dismissal and that Mr. Humphries will be asked to furnish statement to show his earnings in outside employment during that same period, after which you will confer with me as as to what money-payments are due him under Award 18720. Your attention is respectfully directed to the wording of Award 18720, which is as follows:

> "AWARD: Claim sustained with pay for time lost as the rule is construed on the property."

Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board. In this connection your attention is directed to Awards 5248, 16245, 17030, and 17644 of the First Division, National Railroad Adjustment Board, in which earnings in outside employment were not deducted from the time lost payment,

and there are many other Awards. In these cases payments were made for full time lost without any deduction for earnings in outside employment. Accordingly, we will expect Mr. Humphries to be paid for full time lost.

Please advise.

Very truly yours,

Jake Paschall
General Chairman

Bld. Cy. O. E. Alexander, LC
H. T. Turner, RS
B. G. Humphries
With copy of Mr.
JP:IED Scholl's letter of
May 17 attached.

Affidavit of Jake Paschall—Exhibit D

EXHIBIT D.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Office of Director of Personnel
Louisville 1, Kentucky

June 26, 1958

W. S. Scholl
Director of Personnel

J. L. Davis
J. B. Clark
Asst. Directors of Personnel

H. R. Stewart
W. G. Reckley
J. O. Sullivan
A. J. Stierstaedter
Assts. to Director of Personnel

L-306-9

Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen & Enginemen,
Louisville, Kentucky.

Dear Sir:

Please see our exchange of correspondence concerning Award 18720 of the First Division, National Railroad Adjustment Board, involving Fireman B. G. Humphries, Louisville (M.S. 1st) Division.

Following necessary physical examination and qualification by the District Surgeon, Fireman Humphries was notified on May 29, 1958, that he could mark up for service. He stated that he could not go to work at that time, but would report later. Humphries actually returned to work on June 16, 1958, placing himself on a third shift yard engine.

We have secured from our Accounting Department necessary data for determining what Mr. Humphries would have earned as fireman between March 31, 1956 and May 29, 1958, had he not been discharged, and are ready to discuss with you the money payment due him under Award 18720.

But we certainly cannot agree with you that his outside earnings during the time he was out of L. & N. service should not be deducted.

The Awards of the First Division involving L. & N. employes who had been discharged or held out of service for other reasons, when the employes were reinstated with pay, have not been consistent. Some Awards have simply specified the employe would be paid full wages for time lost, at least one specifically provided for deductions of outside earnings and another denied such deduction. Others, including Award 18720 in the Humphries case, provided pay for time lost **as the rule is construed on the property.**

Never has a discipline rule under any agreement this Carrier has with its various classes of employes, including Article 31 of the Firemen's Agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record of ever having done more than make any employe whole when he had other employment while out of L. & N. service in compliance with a Board Award or otherwise. On the other hand, Awards of other divisions of the National Railroad Adjustment Board have consistently recognized the principle that deduction of outside earnings is proper. For instance, we recently reinstated a shop laborer at Nashville in compliance with an Award of the Second Division and deduction of outside earnings was made in line with the discipline rule of the F. & O. Agreement.

I would also call your attention to the common law rule, universally applied by the courts, to the effect that the measure of damages, where a breach of contract is claimed and an employe is wrongfully discharged, is determined by ascertainment of what he would have earned in the employ of the employer, had he not been wrongfully dis-

charged, less any amounts earned in other employment, or which might have been earned by due diligence during the period. This principle of law has been applied by the courts in cases involving railroad claims. In fact, the discipline rule of the Conductors' Agreement, materially the same as Article 31 of the Firemen's Agreement, has been interpreted by the courts as permitting deductions for outside earnings. The case I refer to involves the decision of the Court of Appeals in the case of Louisville and Nashville R. Co. v. Wells, decided March 3, 1942 (289 Ky. 700, 702-706). In that case the Court had the following to say with respect to plaintiff's claim for loss of earnings as a railroad conductor in connection with his allegation that he was unjustly dismissed in violation of Article 31 of the Agreement:

> "4. The plaintiff did not plead or prove that he had been unable to procure any employment during the six years and more since his alleged recovery or that he had not earned any money at all. When a contract for personal services has been wrongfully terminated by an employer, it is the duty of the employe to minimize his damages by diligently seeking to find similar employment in the locality. He cannot sit by idly. He cannot recover more than the difference between the contract wages or salary and the amount he earned or could have earned with reasonable diligence. And on this element of a right of action for damages for breach of contract of employment, the burden is on the plaintiff to allege and prove that he exercised reasonable diligence in the respect stated and his inability to earn anything, if such was the case, or what he earned during the period. John C. Lewis Company v. Scott, 95 Ky. 484, 487, 23 S. W. 192, 44 Am. St. Rep. 251; Abrams v. Jackson County Board of

Education, 230 Ky. 151, 18 S. W. (2d) 1000; Torson Construction Company v. Grant, 251 Ky. 800, 66 S. W. (2d) 79. There was neither pleading nor proof of this fact, so even had the other fatal defects not existed, he would have been entitled to recover only nominal damages. Newport Dairy v. Shackelford, 261 Ky. 754, 88 S. W. (2d) 940."

In your letter of May 20, 1958, you contend earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule. We do not agree. To the contrary, we consider outside earnings in every case, and the four awards to which you refer do not support your contention.

Award 5248 involved Conductor J. B. Cooper who had no outside earnings.

Award 16245 involved Conductor T. J. Holbrooks who had no outside earnings. Furthermore, the settlement in that case included his retirement from active service.

Award 17030 involved Fireman T. Y. Alston who had no outside employment.

Award 17644 involved Yardman C. C. Neal who was only out of service 87 days. Outside earnings were definitely considered in that case. In fact, in our submission to the Board we stated that if for any reason the claim was sustained the money payment to Neal should be the wages he lost as yardman, less any earnings from other employment. And we said to the Board, as we are saying to you now, "This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period." In their rebuttal the employes did not challenge this statement of the carrier and it was our position the Board intended for deduction of outside earnings when it sustained the claim

for pay for time lost to and including August 1, 1951, **as per rule.** It is likewise our position that Board intended outside earnings to be deducted from the time lost by Fireman Humphries when in its Award 18720 the Board ordered him paid "as the rule is construed on the property."

In handling with Mr. Neal as to his outside earnings he certified that he was employed only a part of the short time he was out of L. & N. service. He further stated that in order to secure such part time employment he had to move to Cincinnati and then, of course, had to move back to Ravenna when he was put back to work as yardman. On Mr. Neal's statement that the extra expense he was put to off-set the amount he earned, Management considered he in effect had no outside employment and in line with our practice of making employes whole he was paid in full for the wages he lost while out of L. & N. service.

Had Mr. Neal realized a net gain from his outside employment, Management most certainly would have insisted on deducting such earnings from the amount due him representing his lost time as a yardman.

Fireman Humphries has declined to furnish statement of his outside earnings. If and when this is done, we are ready to make whatever money payment may be due him under Award 18720.

Your truly,
(s) W. S. Scholl
Director of Personnel

Affidavit of Jake Paschall—Exhibit E

EXHIBIT E.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Office of Director of Personnel
Louisville 1, Kentucky

August 9, 1958

W. S. Scholl
Director of Personnel

J. L. Davis
J. B. Clark
Asst. Directors of Personnel

H. R. Stewart
W. G. Reckley
J. O. Sullivan
A. J. Stierstaedter
Assts. to Director of Personnel

L-306-9

Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen & Enginemen,
Louisville, Kentucky.

Dear Sir:

This letter has further reference to the case of Fireman B. G. Humphries who was restored to the service in June of this year in compliance with First Division Award 18720. It is being written at your request to confirm the several conferences we have had, the last one on June 30th, concerning our disagreement over the proper application of that part of the Award reading "with pay for time lost as the rule is construed on the property."

As we have advised you, both by correspondence and in conference, we interpret Award 18720 to mean that any outside earnings Fireman Humphries may have had while out of L. & N. service should be deducted from the amount due him under the Award. I wrote you on June 26, 1958, stating in detail the reasons we feel this is the only proper interpretation that can be placed on the wording of the Award.

It was your position in the conferences that the Board did not have before it for consideration the matter of out-

side earnings in the Humphries case. You and the other general chairmen further contended that earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the discipline rules covering our engineers, firemen, conductors and trainmen. In connection with the latter contention considerable emphasis was laid on recent First Division Awards involving Fireman T. Y. Alston and Yardman C. C. Neal.

We cannot agree with either of the positions taken by you. The very wording of the Award leaves no room for reasonable doubt that the Board had the matter of outside earnings in mind, otherwise there would have been no basis for ordering claimant paid "as the rule is construed on the property." **Furthermore, we are definitely advised that the matter of consideration of outside earnings was before the Referee, at the time he considered the case and made the Award, having been presented to him on brief by a carrier member of the Board as has been customary for the past several years.**

As to the contention that outside earnings have never been taken into consideration in settling claims for time lost on this property. I certainly cannot agree. To the contrary, from my personal knowledge and from information contained in our files, I know management has always given consideration to outside earnings a man, who is to be reinstated with pay, may have had while out of L. & N. service. And as stated in my letter of June 26, 1958,

> "Never has a discipline rule under any agreement this Carrier has with its various classes of employes, including Article 31 of the Firemen's Agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record of ever having done more than make any employe whole when

he had other employment while out of L. & N. service in compliance with a Board Award or otherwise. . . ."

The cases involving Fireman T. Y. Alston and Yardman C. C. Neal referred to above, support our position in the matter rather than yours. In the Alston case we called on him for statement of his outside earnings and attached hereto is copy of statement he signed June 21, 1955, advising he made no money in outside employment. In our letter to you under date of August 26, 1955, we advised you as follows:

> "Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board, which, of course, have to be deducted from the amount due him."

This leaves no doubt that management did give consideration to outside earnings in the Alston case. Furthermore, it is significant that you did not at that time challenge the right of management to secure such information from Fireman Alston or take the position that the rule prohibited the carrier from considering outside employment in arriving at amount that may be due an employe when ordered restored and paid for all time lost under the terms of Article 31 of the firemen's agreement.

Again, the C. C. Neal case supports our statement that management does consider deduction of outside earnings to be proper and permissible under discipline rules. In that case we made the following statement to the Board in our submission dated December 18, 1951:

> "If, despite the gravity of the offense committed by the claimant and despite the oft-repeated declaration by the First Division that the measure of discipline is

not a matter for its consideration, and its numerous declarations that it will not substitute its judgment for that of the management in discipline cases, the Division should conclude that the claim involved herein should be sustained and the claimant paid for any time lost, then this Company, without waiving its position as to the merits of this claim, submits that the Division should find and award that the claimant be paid only for time actually lost by reason of the discipline imposed, that is, for the days the claimant was available and stood for work in his class or craft, less any earnings from other employment. This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period."

General Chairman Lane made his rebuttal to our submission on January 7, 1952. That rebuttal challenged numerous statements made by the carrier, but very significantly took no exception whatever to the above statement made by us concerning the matter of deduction of outside earnings.

The record simply will not support your contention that no consideration has ever been given to outside employment in settling claims for time lost on this property under the rule. Then let us look at the rule itself. You contend management is attempting to read something into the rule that is not there when we say the rule permits deduction of outside earnings. Then you turn right around and attempt to enlarge on the rule by saying it prohibits any consideration being given to time earned in outside employment in determining time lost because of the disciplinary action taken whereas the rules contains no such prohibition.

Affidavit of Jake Paschall—Exhibit E

Management is not attempting to enlarge on or change the wording of the rule. We simply say again that the rule as written does not prohibit consideration being given to the time a fireman may have made in outside employment in arriving at time lost by him as a result of disciplinary action.

Those who originally wrote the rule are long since gone. But as above stated, from my personal knowledge and as far as I have been able to determine from the record, management has always considered deduction of outside earnings to be proper under the rule. The rule as written certainly does not prohibit this being done and as pointed out in our letter of June 26, 1958, Article 31 of the conductor's agreement on this property, materially the same as Article 31 of the firemen's agreement, has been interpreted by the Courts of Kentucky to permit deduction of outside earnings.

We have complied with that part of Award 18720 with respect to restoring Fireman Humphries to the service. We stand ready to comply with the balance of the Award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the Award may be determined.

Yours truly,

(s) W. S. Scholl

Director of Personnel

Copy: Mr. W. E. Mitchell,
Vice President, B.ofL.F.&E.,
Louisville, Kentucky.

Radnor, Tenn., June 21, 1955

Mr. C. A. Allner:

This is to advise that I have made no money in outside employment since my dismissal in February 1953 as I have been unemployed since that time.

(s) T. Y. Alston

Yard Fireman

Affidavit of Jake Paschall—Exhibit F

EXHIBIT F.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

General Grievance Committee — Louisville and Nashville R.R.
Jake Paschall, Gen'l Chairman
404-5 Hoffman Building

Please Refer To
File H-578-14

Louisville 2, Kentucky
November 14, 1958

Mr. J. M. McLeed, Executive Secretary,
National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois

Dear Sir:

Acknowledging your letter of October 9, 1958 (File Docket 34 752) in connection with letter dated September 23, 1958, to you from Mr. W. S. Scholl, Director of Personnel, Louisville and Nashville Railroad Company, to which a petition was attached, requesting interpretation of Award 18720 (Docket 34752); and your request that I:—

> "(1) Advise whether or not there is a dispute as to the meaning of this award, and if so, . . ."

Docket 34752 was an ex parte petition from the carrier to the National Railroad Adjustment Board, First Division, which, pursuant to the Railway Labor Act, should have contained the "full statement of the facts and all supporting data bearing upon the dispute"; however, in the carrier's petition, no facts or argument were given concerning "outside earnings", and no issue was raised with the Employes, as to deductions to be made in case of a sustaining award.

Further, the Carrier did not request an Award permitting the deduction of "outside earnings" and it is the Employes'

view that it can not now petition the Division for an interpretation which would, in fact, be presenting a new case and a dispute not argued nor presented by the carrier or acted upon in the Award.

This will advise you that there is no dispute on the part of the Brotherhood of Locomotive Firemen and Enginemen as to the meaning or intent of Award 18720 and the Carrier is simply attempting to have the Award changed in the guise of an interpretation.

Yours very truly,

(s) Jake Paschall
General Chairman

Approved
(s) W. E. Mitchell
Vice President

cc: Mr. W. S. Scholl, DofP., L&N RR 2 cys
Mr. H. E. Gilbert, Int. Pres. BLF&E
bld cc: Mr. Guy L. Brown, GCE, BLE
Mr. J. A. Paddock, Pres., ORC&B
Mr. W. P. Kennedy, Pres., BofRT
Mr. Don A. Miller, Vice-Pres., BLF&E
bld cc: Mr. H. J. Roadcup, GC, BLE, L&N
Mr. L. G. Mulinix, GC, ORC&B, L&N
Mr. N. E. Lane, GC, BofRT
Bld.cc: Mr. H. R. Haskins, Asst. GCE, BLE
Mr. W. R. Walters, V-P, ORC&B
Bld CC: Mr. C. J. McClain, V-P, BofRT

Affidavit of Jake Paschall—Exhibit G

EXHIBIT G.

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee Mortimer Stone

Interpretation
Award 18 720
Docket 34 752

Parties to Dispute } Louisville and Nashville Railroad Company
Brotherhood of Locomotive Firemen and Enginemen

INTERPRETATION

The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

Facts and supporting data as to that issue were not included in the docket on which Award 18 720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17 500 and "Interpretation" thereof.

National Railroad Adjustment Board
By Order of First Division
Attest: (s) J. M. MacLeed
Executive Secretary

Dated at Chicago, Illinois,
This 17th day of December 1958.

Affidavit of Jake Paschall—Exhibit H

EXHIBIT H.

Form:

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee Carroll R. Daugherty

Award 19 363
Docket 36 463

Parties to Dispute: Louisville and Nashville Railroad Company; Brotherhood of Locomotive Firemen and Enginemen

Statement of Claim: "Claim of Fireman B. G. Humphries for the wages he lost as fireman from March 31, 1956 to May 29, 1958 without deduction of wages he earned in outside employment during that period of time."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Fireman B. G. Humphries was dismissed from the service of petitioning carrier on March 31, 1956. The propriety of the carrier's action was challenged by the Brotherhood of Locomotive Firemen and Enginemen who instituted claim on behalf of Fireman Humphries for reinstatement to service with former seniority unimpaired and monetary relief for payment of all time lost, and "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" through the grievance-step procedure to a conclusion on the property.

At that juncture, the carrier by ex parte submission submitted the dispute to this First Division and petitioned this Division to place its stamp of approval upon the dismissal of claimant fireman involved. On May 14, 1958, this Division, in rendering Award 18 720 on Docket 34 752, held adversely on the carrier's petition and sustained the claim of Fireman Humphries to "be reinstated to service with former seniority unimpaired and paid for all time lost" in the language "with pay for time lost as the rule is construed on the property," and so ordered petitioning carrier.

Upon receipt of copy of Award 18 720 and this Division's accompanying order, General Chairman Paschall wrote Mr. W. S. Scholl, Director of Personnel, stating that "it is assumed that you will comply with this order promptly and not later than the time specified in the order." On May 17, 1958, Mr. Scholl wrote Mr. Paschall, acknowledging receipt, advising that "instructions are being issued today to cover Fireman Humphries' restoration to the service" and also that "a prompt check will also be made to determine his loss of wages during the period of his dismissal, and Mr. Humphries will be asked to furnish a statement of his earnings in outside employment during that same period." On May 20, 1958, Mr. Paschall replied to Mr. Scholl advising that "earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board."

Under date of September 23, 1958, the carrier, proceeding under Section 3, First, (m), of the amended Railway Labor Act, again submitted an ex parte petition to this Division requesting an interpretation of Award 18 720 to permit "deduction of outside earnings in determining the amount of time lost due Fireman B. G. Humphries" under Award

18 720. By formal Interpretation of Award 18 720 on December 17, 1958, this Division declined to act favorably upon the carrier's ex parte petition, holding (in part):

> ". . . the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17 500 and 'Interpretation' thereof."

Comes now the carrier (by ex parte submission dated January 23, 1959), on the premise of a new case, petitioning that "this Board should so hold by ordering outside earnings, if any, deducted from the amount due Fireman Humphries under Award 18 720." Carrier and its representative here argue that the Division now has the new case and contend that the record shows that carrier has in the past adhered to the deduction principle. The respondent employes contend that (1) the instant "case" has no lawful standing before the Division and must be dismissed on the split-cause and **res judicata** rules, and (2) in any event the no-deduction principle has prevailed on the property.

Award 18 720, involving Fireman Humphries' claim for reinstatement to service and pay for all time lost, was based upon the record in Docket 34 752, as required by Circular No. 1 of the National Railroad Adjustment Board and Circular B of this First Division. The submission in Docket 34 752 did not present and argue the question (deduction or no deduction) regarding the proper interpretation of Rule 31 (f) of the firemen's agreement, although the question could have been included in that submission because such question (if extant) is inherent in Humphries' claim for reinstatement. The First Division subsequently declined a request by petitioning carrier that it interpret Award 18 720 for the purpose of determining whether out-

side earnings should be deducted from the pay due to Humphries, simply because the schedule rule in its application on this subject was not considered by this Division in Award 18 720. Accordingly, this Division may not now, pursuant to a new submission, interpret the schedule rule in its application on this subject, because to do so would clearly violate the rule of this Division against permitting the piece-meal submission of disputes. The matter must be judged **res judicata.** The petitioning carrier had the opportunity of submitting the dispute involving Humphries' claim to reinstatement in all of its aspects, and its present attempted submission of one phase of that dispute must accordingly be dismissed.

Award: Case dismissed.

National Railroad Adjustment Board
By Order of First Division
Attest: (s) J. M. MacLeed
Executive Secretary

Dated at Chicago, Illinois,
This 9th day of December 1959.

JOINT AFFIDAVIT OF H. G. ROADCUP AND L. G. MULINIX.

Affiants, H. G. Roadcup and L. G. Mulinix, state that they are respectively General Chairman (L&N System) of the Brotherhood of Locomotive Engineers and General Chairman (L&N System) of the Order of Railway Conductors and Brakemen, and that they were such General Chairmen of their respective unions at all times referred to in the Affidavit of Jake Paschall filed in this case in support of Defendants' motion to dissolve the preliminary injunction herein. Each for himself states that he is familiar with Article 31(f) of the Agreement between the Louisville And Nashville Railroad and the Brotherhood of Locomotive Firemen and Enginemen which provides as follows:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Each states that his union also has a contract with the Railroad Company and that such contract contains a provision in language substantially similar to that contained in Article 31(f) of the contract between the Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen above quoted.

Each states that he has carefully read the Affidavit of Jake Paschall, General Chairman (L&N System) of the Brotherhood of Locomotive Firemen and Enginemen filed herein in support of Defendants' motion to dissolve the preliminary injunction herein; and each states for himself that he was furnished by Mr. Paschall a copy of the letter of June 26, 1958 from the Railroad Company to Mr. Paschall, referred to in Mr. Paschall's Affidavit.

Joint Affidavit of H. G. Roadcup and L. G. Mulinix

Each for himself states that as stated in Mr. Paschall's Affidavit, Mr. Paschall did request him in his capacity as General Chairman of his union to join the said Paschall in an effort to induce the Railroad Company to comply with the Humphries award without making deduction for outside earnings and to induce the Railroad Company to agree that no such deduction was authorized by Article 31(f) of the contract between the Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen, and each affiant for himself says that because he considered a decision of the issues involved in the controversy in respect of the Humphries award in line with the contention made by Paschall, General Chairman (L&N System) of the Brotherhood of Locomotive Firemen and Enginemen, of vital importance to the members of Affiant's union who were employees of the Railroad Company, he agreed to comply with Mr. Paschall's request and to cooperate with him in the efforts of the latter to induce the Railroad Company to pay the award to Humphries without the deduction of outside earnings, and, accordingly, he did attend the conference between Mr. Paschall, each of these Affiants and representatives of the Railroad Company on July 7, 1958, as stated in Paschall's Affidavit.

Each states that Mr. Paschall's statements in his Affidavit in respect of those who attended the conference of July 7, 1958, between representatives of the Railroad Company and their respective unions, and of what took place at that conference, are true.

Each for himself states that following the conference of July 7, 1958, each of the General Chairmen of the unions participating therein agreed to request the head of his respective union to assign someone from the general office of his union to assist in further negotiation with the Railroad Company in respect of the Humphries controversy;

Joint Affidavit of H. G. Roadcup and L. G. Mulinix

and each of these Affiants for himself states that he made such a request of the head of his union and that that request was complied with.

Each states that the statements of Mr. Paschall's Affidavit with respect of the conference held on July 30, 1958, between the representatives of the unions and representatives of the Railroad Company in respect of the persons who attended that conference and what took place at same are correct.

Each says for himself that the statements contained in Mr. Paschall's Affidavit in respect of each applying for authority to call a strike vote for the purposes stated in the Paschall Affidavit, the statements with reference to the granting of that authority, with reference to the taking of a strike vote and with reference to the strike vote authorizing the calling of such a strike are true.

Each Affiant for himself states that Mr. Paschall furnished to him a copy of the letter of August 9, 1958 from the Railroad Company to Paschall.

Each states that as set out in Mr. Paschall's Affidavit, the Railroad Company was fully advised of the call for the strike vote, of the taking of that vote and of the result thereof.

Each states that he attended the conference between representatives of the unions and representatives of the Railroad Company on January 23, 1959, and that Mr. Paschall's Affidavit correctly states the persons present at that conference for the Railroad Company and for the unions, and also correctly states what took place at that meeting and the result thereof.

They state that the Paschall Affidavit correctly states the facts in respect of the third submission of the Humphries controversy to the National Railway Adjustment Board by the Rialroad Company on January 23, 1959, and

the disposition of that submission by the First Division of the Board on December 9, 1959.

They state that the Paschall Affidavit correctly states the facts in respect of the calling of the strike for February 13, 1959, and in respect of the temporary restraining order secured by the Railroad Company on February 12, 1959.

Affiants say that the statements contained in the Paschall Affidavit in respect of the attempt on the part of the Railroad Company in 1947 to secure an amendment to the union contracts it had with the unions here involved, and the result of that attempt are true.

Each of the Affiants for himself further states that at no time since the Railroad Company gave the Section 6 notice of June 20, 1947, or prior thereto, has there been any agreement between his union and the Railroad Company that the contract between his union and the Railroad Company should be construed as authorizing the deduction of outside pay in the settlement with a member of his union of such an award as that involved in the Humphries case; and each for himself states that to his knowledge the Railroad Company has never deducted any outside pay in the settlement with a member of his union of such an award as that involved in the Humphries case; and each of these Affiants regards the attempt of the Railroad Company to deduct outside pay in settling the Humphries award as an attempt to illegally and unilaterally work a change in his union's contract with the Railroad Company.

Each Affiant files herewith a copy of that provision of his union's contract with the Railroad Company which corresponds to Article 31(f) of the contract between the Brotherhood of Locomotive Firemen and Enginemen and the L&N Railroad Company.

Joint Affidavit of H. G. Roadcup and L. G. Mulinix

This August 17, 1960.

H. G. Roadcup

L. G. Mulinix

Subscribed and sworn to before me by H. G. Roadcup and L. G. Mulinix this August 17, 1960.

My commission expires December 3, 1960.

Notary Public, State-at-Large, Kentucky.

COPY OF ARTICLE 31(f) OF THE CONTRACT BETWEEN THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS PRESCRIBING ACTION TO BE TAKEN IF DISCIPLINE IN THE FORM OF DISCHARGE OF AN EMPLOYEE IS NOT SUSTAINED.

"If the discipline administered is not sustained, it will be canceled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken."

COPY OF A PORTION OF ARTICLE 31 OF THE CONTRACT BETWEEN THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND THE ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN PRESCRIBING ACTION TO BE TAKEN IF DISCIPLINE IN THE FORM OF DISCHARGE OF AN EMPLOYEE IS NOT SUSTAINED.

"In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

AFFIDAVIT OF J. M. KING.

Affiant, J. M. King, says that since January 19, 1959, he has been the General Chairman (L&N System) of the Brotherhood of Railroad Trainmen; that prior to that date for a period of eight years he had been Vice General Chairman (L&N System) of his union; and that for eight years immediately prior to the time he became Vice General Chairman he was a member of the Grievance Committee of his union. Therefore, he was in active touch with the affairs of his union and its dealings with the Louisville and Nashville Railroad Company at all of the times mentioned in the Affidavit of Jake Paschall. However, he did not attend the meeting of July 7, 1958, between representatives of the Railroad Company and of the unions, including Affiant's union, mentioned in the Paschall Affidavit, nor did he attend the meeting of July 30, 1958 between representatives of the Railroad Company and of the unions, including his union, referred to in the Paschall Affidavit. However, he did attend the meeting between representatives of the Railroad Company and of the unions, including his union, held on January 23, 1959, and he states that the statements contained in the Paschall Affidavit in respect of that meeting, of the persons who attended and what took place are true.

As an officer of his union, Affiant is entirely familiar with the giving by the Railroad Company of the Section 6 notice of June 20, 1947, expressing its desire to make certain changes in the contracts between the Railroad Company and his union, between the Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen, between the Railroad Company and the Brotherhood of Locomotive Engineers, and between the Railroad Company and the Order of Railway Conductors and Brakemen, one of those changes being numbered

Item 18 in the notice, which contemplated that in future settlements of awards the Railroad Company should have the right to deduct from the compensation for time lost all outside earnings of the person in whose favor the award had been made. He has carefully read the Affidavit of Mr. Paschall about what took place under that notice and about the final agreement made on August 11, 1948, which made no change whatever in the contracts of the respective unions with the Railroad Company so as to permit the Railroad Company to deduct outside earnings in settling awards, and says that the statements therein contained are true.

He states that since August 11, 1948, he knows from his files and from his position with his union that no agreement was ever made between the Railroad Company and his union permitting the deduction of outside earnings, authority for which was sought by the Railroad Company under its Section 6 notice procedure; and he further states that he has no knowledge of the Railroad Company having ever deducted outside earnings in the settlement of awards in the character of the Humphries award.

Affiant files herewith as a part hereof a copy of that portion of Paragraph 2 of Article 31 of the contract between his union and the Louisville and Nashville Railroad Company which is comparable to Article 31(f) of the contract between the Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen.

This August 17, 1960.

J. M. King

Affidavit of J. M. King

Subscribed and sworn to before me this August 17, 1960.
My commission expires December 3, 1960.

Notary Public, State-at-Large,
Kentucky.

COPY OF A PORTION OF ARTICLE 31 OF THE CONTRACT BETWEEN THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND THE BROTHERHOOD OF RAILROAD TRAINMEN PRESCRIBING ACTION TO BE TAKEN IF DISCIPLINE IN THE FORM OF DISCHARGE OF AN EMPLOYEE IS NOT SUSTAINED.

"In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

SUPPLEMENTAL AFFIDAVIT OF L. G. MULINIX.

Affiant, L. G. Mulinix, states that he is General Chairman (L&N System) of the Order of Railway Conductors and Brakemen, and that on August 8, 1952, the National Railroad Adjustment Board, First Division, decided the claim of Conductor T. C. Smith that he should be permitted to return to the service of the Louisville & Nashville Railroad Company as conductor and paid for time lost from the time he was discharged until such time as he might be reinstated. In that case, the question of whether or not the Railroad Company was entitled to deduct Smith's outside earnings in the settlement of any award for time lost which might be made in his favor was expressly raised by

the Railroad Company, and the issue decided by the National Railroad Adjustment Board, the Board holding that the Railroad Company could make no such deduction of outside earnings. He files herewith as part hereof copy of the decision of the National Railroad Adjustment Board, First Division, Award No. 15,655, Docket No. 28,562, dated August 8, 1952; copy of the dissenting opinion of the Carrier members of the Board, First Division, dated September 18, 1952; and copy of the supporting opinion by the Labor members of the Board, First Division, dated November 4, 1952, which was joined in by the Referee, John A. Wheets.

Affiant further states that said award in the gross amount of $14,615 less taxes was paid in full without any deduction for outside earnings. He states that the contract between his union and the Railroad Company, which was in effect at the time that controversy arose and at the time the Adjustment Board decided same, in so far as it dealt with awards for wrongful discharge, was in exactly the same language as is the corresponding provision in the present contract between his union and the Railroad Company.

This August 18, 1960.

_____

Subscribed and sworn to before me by L. G. Mulinix this August 18, 1960.

My commission expires _____.

_____

Notary Public

Kentucky.

Supplemental Affidavit of L. G. Mulinix

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

With Referee John A. Weeks

Docket 28562
Award 15655

Parties to Dispute } Order of Railway Conductors
Louisville and Nashville Railroad Company

Statement of Claim: "Claim of Conductor T. C. Smith, Pensacola Division, that he should be permitted to return to the service, as conductor, and that he be paid for time lost beginning with April 1, 1951."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.
Hearing was waived.

Request for reinstatement by conductor and pay for time lost since April 1, 1951.

Following some surgery at the suggestion of carrier's medical examiner claimant applied for retirement which was granted. Subsequently his own doctors and those of the railroad approved his return to work, including the one who advised and recommended his retirement. Men on disability retirement under 65 years of age may return to work upon recovery from disability. Claimant is within the permissible age and has medical reports from both his own doctors and the railroad doctors approving his return to work.

A refusal to reinstate when claimant is entitled thereto is the same as a wrongful discharge and will be considered as such under Rule 31 of the conductors' agreement which provides for restoration to the service with full rights and paid full wages for any time he may have lost. The carrier was not justified in ignoring and overriding its own medical examiners. Claimant was entitled to return to work April 1, 1951 as a passenger conductor.

The carrier Board members here contend any money claimant has earned outside of his retirement pay should also be deducted. The docket does not disclose any such earnings by claimant or the claim of any by the carrier when the matter was considered on the property. However, it is contended this question is in all claims for lost pay by reason of wrongful discharge or refusal to reinstate in a disability case.

Deduction of outside earnings as this question is called has long been the subject of bitter controversy on this Division. Those against deduction assert the rule alone governs and those for contend the agreement or rule is impliedly modified by the old common law rule which is followed by most courts in civil cases which require the mitigation of damages by deduction of other earnings during the term of the contract for which lost wages are allowed.

Under the common law rule as followed by the courts in cases other than railroad claims the wronged employe may also recover consequential or special damages in addition to his lost wages.

The usual railroad schedule states the employe shall recover all wages or time lost. It does not say and other losses consequential or caused by the wrongful discharge or refusal to reinstate nor does it say less earnings he may have re-

ceived from other employment. However, the carrier contends we must infer the latter and exclude the former.

Construction of contracts requires the ascertainment of the intent of the parties. What was the intent of the parties when the contracts were made? The common law rule which is followed by the courts was well known at the time the present railroad schedules or contracts were made with the employe organizations. No doubt skilled lawyers attended both parties to the agreements, and yet the contracts were silent on both consequential damages and deduction of outside earnings.

It appears from the arguments that in the early awards wrongfully discharged employes were paid lost wages or time without deduction of outside earnings and, as was stated by a carrier member of the Board, they were usually of a minor nature, only 30 or 40 days pay. Apparently it was not until they became substantial that a demand was made for deductions. Why this early practice did not establish a precedent as an expression of the intent of the parties has not been explained.

However, since the question was first raised it has constantly plagued boards and referees. Awards have been made for and against deduction of outside earnings. Each side claiming the larger number of awards in its favor.

Permitting deductions allows the wrongdoer to save himself, partially or wholly, harmless by reason of the financial necessity or industry of the injured innocent party.

Permitting deductions will tend to make over zealous or vindictive officials more irresponsible and reckless in the discharge of employes if they know they will have little or nothing to pay even if it is subsequently determined the discharge was unjustified, where the employe must seek other work to tide him over, which is the usual situation.

Supplemental Affidavit of L. G. Mulinix

No railroad case covering this question has been considered by the U. S. Supreme Court.

St. Louis Railway Company vs. Booker, 5 S. W. 2nd 856 (1928) in which the U. S. Supreme Court denied certiorari is not an affirmance of the decision below. The U. S. Supreme Court has often said the denial of certiorari does not imply affirmance or approval of the decision below.

Payment of only the wage loss does not make the employe whole if he has suffered other losses as a consequence of his wrongful discharge or refusal of reinstatement. The most important phase of this question however, is that the contract is silent on the matter of deduction of outside earnings as well as recovery of consequential damages.

In Award 5080, Referee Justice Royal A. Stone on another subject said in part:

> "The contract does not so provide. If penalty is to be awarded it must be based upon implication. Such implication as there is runs the other way, for the reason that the contract in the numerous places indicated provides for additional pay for stipulated arbitrary periods, even though the work requires much less time. **Silence of the contract concerning a minimum days pay in such cases as this is convincing that it was not intended.**" (Emphasis supplied.)

If silence in the contract in the above instance implies it was not intended why does not silence regarding deduction of outside earnings imply also it was not intended?

Allowing deductions except as to self employment as was done in Award 11463 cannot be justified. An employe may earn more when self employed than one working for wages.

Supplemental Affidavit of L. G. Mulinix

The effect of Award 5862 is neutralized by the rationalization of suggested liberality towards the employe in the exercise of the principle and that he should not be held too strictly to the requirement that he seek other employment.

In Buster vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, U.S.C.A., 7th Circuit, March 1952, the court indulged in pure unadulterated obiter dictum regarding deduction of outside earnings. The only question submitted to the jury was whether the discharge was just. The jury said no. The court set the verdict aside and entered judgment for the defendant. The sole question on appeal was whether the plaintiff had a fair hearing. The Circuit Court said he had a fair hearing. Then without any necessity or or requirement for such comment the court gratuitously added its views on the question of damages.

The only purpose it could serve was to minimize the harshness of the court's decision in substituting its judgment for that of the jury.

To allow deductions for outside earnings adds something to a written rule it never contained and which the parties never contemplated when it was written. The early awards in which deductions were not allowed strongly support this view. To now inject this into the rule puts a premium on idleness, encourages irresponsibility in discharge or reinstatement matters, and produces unfair, unjust, and discriminatory results.

Disallowance of deductions for outside earnings is not a penalty on the carrier as it pays no more than it contracted to pay. The loss of work is caused entirely by its own deliberate wrongful act of discharging its employe without good cause or refusing to reinstate when so required.

Supplemental Affidavit of L. G. Mulinix

Award: Claim sustained without deduction of outside earnings, if any, less payments to Retirement Fund.

National Railroad Adjustment Board
By Order of First Division
Attest: (s) J. M. MacLeed
Executive Secretary

Dated at Chicago, Illinois.
This 8th Day of August, 1952.

SUPPLEMENTAL AFFIDAVIT OF JAKE PASCHALL.

Affiant, Jake Paschall, General Chairman (L&N System) of the Brotherhood of Locomotive Firemen and Enginemen, states that he has read the Affidavits of W. T. Wallace, H. R. Stewart, G. C. Howard, A. J. Stierstaeder and J. B. Clark filed herein by the plaintiff Railroad Company, and, because of the inaccuracies and misleading statements contained in those affidavits he files this Supplemental Affidavit for the purpose of pointing out those inaccuracies and misleading statements.

At page 3 of the Wallace affidavit, it is stated that the

> "carrier had always understood and interpreted Article 31 of the firemen's agreement to permit deduction of outside earnings, if any, from the amount the fireman would have earned had he remained in railroad service."

If, by the above quoted statement, the Affiant, Wallace, meant to convey the idea that there was any agreement between the Railroad Company and this Affiant's Brotherhood that Article 31 (f) of the Firemen's contract permitted the deduction of outside earnings, such insinuation

or intimation is absolutely without foundation. If, by the quoted language, the Affiant, Wallace, intended to convey the impression that in settling awards such as the Humphries award the Railroad Company, in accordance with its alleged interpretation of Article 31 (f), deducted outside earnings, such intimation or claim is absolutely without foundation; because this Affiant states that not only the first contract between his Brotherhood and the Railroad Company, executed on August 1, 1919, but each succeeding contract, has contained a provision in language identical with that contained in Article 31 (f) of the present contract, and the Railroad Company has never, during the entire period from August 1, 1919, to this date, made settlement of any award of the character of the Humphries award by deducting outside pay, and this Affiant states that if Mr. Wallace does not know that fact, he could have easily ascertained same by an examination of the files and records of the Railroad Company.

Affiant further states that through all of the affidavits filed by the Railroad Company appear references to the Railroad Company's interpretation of Article 31 (f) of the contract between the Railroad Company and Affiant's Brotherhood, which deals with the obligation of the Railroad Company when discipline action on the part of the Railroad Company has not been sustained. Each of the affiants making the affidavits filed by the Railroad Company must know that the Railroad Company has never had the right to make a unilateral interpretation of Article 31 (f). Each knows that Article 32 (c) of the present contract between Affiant's Brotherhood and the Railroad Company provides:

> "(c) General rulings or interpretations as to the proper construction of this Agreement will not be made except in conference between the General Officials of

the Railroad and the General Committee or General Chairman. When such rulings or interpretations are made, a copy of same will be furnished to the parties affected and the General Chairman." (of the Brotherhood)

"When such rulings or interpretations are made, a copy of same will be furnished to the parties affected and the General Chairman."

A similar provision was in each of the prior contracts between the Railroad Company and Affiant's Brotherhood; and each Affiant knows that no such agreement for the construction of Article 31 (f) as contended for by the Railroad Company has ever been made as provided in Article 32 (c) of the contract, and that no such interpretation has ever been agreed to between the Railroad Company and the Brotherhood in any other manner.

The Wallace Affidavit undertakes to support its claim of right to deduct outside earnings by statements to the effect that before settling awards made to its employees, it had demanded of such employees a statement of outside earnings. If any such demand was ever made in reference to an award in a discipline case, it was made without the knowledge of this Affiant as General Chairman (L&N System) of his Brotherhood; but in respect of such demand claimed by Wallace to have been made in the Alston case, this Affiant learned of same—not from the Railroad Company, but from a copy of Alston's letter to the Railroad Company in which he stated that he had no outside earnings.

The Wallace Affidavit, at page 12, cites five cases as evidence of the different ways in which the First Division of the National Railroad Adjustment Board has dealt with the deduction of outside pay. However, Awards 15,655 and 12,629, referred to in the Wallace Affidavit, were dis-

ability cases—not discipline cases—and, therefore, those cases throw no light on the proper construction of Article 31 (f) which deals exclusively with awards in discipline cases. Awards 17,025 and 3,512 were not awards to employees of the Louisville and Nashville Railroad Company, and, of course, did not involve the construction of Article 31 (f). The Affidavit does not disclose what the union contract provided in either of those cases in respect of discipline cases where the discipline is disallowed.

The Humphries case is the first case in which this Affiant was informed by the Railroad Company of its contention of its right to deduct outside earnings in settling discipline awards under Article 31 (f); and this information was not received from the Railroad Company until after the award had been made and after Affiant had demanded that it be complied with, that contention being made first on May 17, 1958 in a letter from the Railroad Company to Affiant (Exhibit "B" to Affiant's original affidavit), in reply to the latter's letter of May 16, 1958 (Exhibit "A" to Affiant's original affidavit). Affiant, in a letter to the Railroad Company dated May 20, 1958 (Exhibit "C" to Affiant's original affidavit), denied the claim asserted in the Railroad Company's letter of May 17, 1960, of its right to deduct outside earnings of Humphries in settling the award made to him by the First Division of the National Railroad Adjustment Board.

Wallace filed with his Affidavit a copy of his letter to this Affiant dated June 26, 1958, in which he refers to an award made to a shop laborer in Nashville, Tennessee, which was settled by deducting from the amount due for time lost outside earnings of the shop laborer. Reference to the settlement of that case was for the purpose of trying to sustain the Railroad Company's claim that Article 31 (f) of the contract had been interpreted as permitting the

deduction of outside earnings. This statement in the letter of June 26, 1958, filed by Wallace and his attempt to make it a basis for the contention that Article 31 (f) had been interpreted as claimed by the Railroad Company is, to say the least, a palpable attempt to mislead the Court. Nowhere has the Railroad Company or its affiants advised this Court that the shop laborer referred to in the affidavit was a member of the Firemen and Oilers' union, and at the time of the settlement referred to that organization had a contract with the Louisville & Nashville Railroad Company which expressly provided for the deduction of outside earnings in the settlement of awards rendered in discipline cases. That provision in that contract was Article 16, Section (g), and read as follows:

> "(g) If the final decision is in favor of the employe, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for any time lost on the basis of straight time for each working day, less whatever amount he may have earned in outside employment or business during such time. **If there should be any claims made by him under this rule, the employe shall, in good faith, make declaration of the amount thus earned by him while outside the Railroad Company's employ.**" (Emphasis added.)

Of course, in the settlement of the shop laborer's claim, outside wages were deducted because the contract between his union and the Railroad Company commanded that those earnings should be deducted and made it the duty of the employee to disclose his outside earnings.

The Wallace Affidavit refers to the case of the Louisville & Nashville Railroad Company v. Wells, 160 S. W. 2d 16, as supporting the Railroad Company's theory that outside earnings are deductible in awards to firemen such

as the Humphries award. Affiant is doubtful that Wallace understood the Wells case; but certainly, there can be no doubt that the Railroad Company and its counsel thoroughly understand the case. In commenting on that case, Affiant desires to point out first that Article 31 (f) of the contract of his Brotherhood with the Railroad Company deals with cases where an employee has been discharged or temporarily suspended and is required to be reinstated. They are known in railroad parlance as "discipline cases." The Wells case was not that kind of case. Wells had contracted "jake leg", which was a well-known affliction visited upon many drinkers during prohibition days from drinking Jamaica ginger mixed with alcohol unfit for human consumption. The characteristic of "jake leg" was that it paralyzed, if it didn't kill, and, in many cases, the paralysis was permanent and the disability total. Wells was a conductor on the L&N lines, and he contracted "jake leg", and claimed total disability. He collected total disability benefits from a group policy carried by the Railroad Company for its employees, at the employees' expense. Wells, having established his total disability, the Railroad Company wrote him that because of his claim of total disability and allowance therefor, he was "recorded out of service." He was not discharged, nor was he suspended; in order words, he was not disciplined. He was recorded out of service simply because of total disability, which he, himself, claimed and prov[illegible]. So, the fact that he was recorded out of service was not due to any action of the Railroad Company. After he had collected all of the group insurance for total disability, he claimed that he had gotten well enough from his "jake leg" affliction to go back in his railroad service and in May, 1933, within one month after he had collected the last of his disability payments, he applied for reinstatement into active service. That was denied, and then he sued the Railroad Company for dam-

ages for breach of contract, and the Court held that in fixing his damage, the damage proven should be subject to a deduction of outside earnings, and that it was his duty to show that he made a reasonable effort to get outside earnings. Not a word is contained in the opinion in reference to the fact that Article 31 (f) fixed the measure of damage; and no such contention was advanced by the Railroad Company—this for the very good reason that the Wells case was not a case for the application of Article 31 (f) which deals only with discipline cases, and the Court so held.

In this connection, Affiant wishes to point out that the sum and substance of the Railroad Company's contention is that in all awards such as the Humphries award, which was the aftermath and the final result of improperly administered discipline, the pay for lost time is subject to a deduction of outside earnings. Affiant's Brotherhood and the other Brotherhoods involved have never quarreled with the common law rule applicable to the breach of ordinary contracts which do not contain within their terms the agreed measure of damages for their breach. While Affiant is not a lawyer, it has been his understanding, and it is the contention of his Brotherhood as well as the contention of the other Brotherhoods whose members are employed on the L&N System, that under the law, if the parties to an agreement fix the measure of recovery for its breach, whether that measure of recovery is expressed in dollars and cents or in a formula from which the dollar and cents amount can be determined, and that amount is not so utterly out of relation to the damage actually suffered as to amount to a penalty, the amount fixed in the contract is the amount to be recovered or to be paid by the party in default, and the common law rule has no place in such a situation.

As evidence of this rule, Affiant points to the case of Wise, Trustee, v. United States, 249 U. S. 361. In that case, the Supreme Court said (page 365):

"The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in Sun Printing & Publishing Association v. Moore, 183 U. S. 642, applied in United States v. Bethlehem Steel Co., 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or **where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.** There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced." (Emphasis added.)

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The rule laid down in that case is the rule upon which Affiant and his Brotherhood rely in support of their contention in respect of the deduction of outside earnings in the Humphries case. It is that rule which the Railroad Company and its spokesmen seek to ignore. Affiant believes that knowledge on the part of the Railroad Company and its counsel of that rule was the cause of the Railroad Company seeking by a Section 6 notice in 1947 to rewrite Article 31 (f) of the contract between the Railroad Company and Affiant's Brotherhood and similar provisions in the contracts between the Railroad Company and the other operating Brotherhoods on its line.

At this point, Affiant wishes to relate another attempt by the L&N—prior to the attempt under the Section 6 notice of June 20, 1947—to rewrite Section 31 (f) of the contract of Affiant's Brotherhood and similar provisions in the contracts of the other Brotherhoods. On July 27, 1945, the Railroad Company served a Section 6 notice on the General Chairman of Affiant's Brotherhood and on the General Chairmen of the other unions which are defendants in this case of its desire to rewrite certain provisions of the existing contracts between the Railroad Company and those unions. The changes desired by the Railroad Company were listed in an "Attachment A", just as was done in the Section 6 notice of June 20, 1947. Item 20 of the "Attachment A" was in exactly the same language as Item 18 of "Attachment A" attached to the Section 6 notice of June 20, 1947, which was quoted in Affiant's former affidavit. Conferences were had on the property between the Railroad Company and the unions involved, which resulted in no settlement; and, by agreement, the matter then went to a National Conference Committee, and the Railroad Company was unable to obtain a change in Article 31 (f) indicated by Item 20 of "Attachment A." That Article was left just

as it has been since the first contract between the Railroad Company and this Affiant's Brotherhood. So, at the time the Railroad Company was asserting its right to deduct outside earnings in settlement of the Humphries award, the Railroad Company and its officers knew that it had been unsuccessful in two attempts to renegotiate with the unions the change which it desired in Article 31 (f) and its counterparts, and, accordingly, the conclusion cannot be escaped that when the Railroad Company refused to settle the Humphries award without such deduction, it was deliberately taking a position in violation of its contract.

At page 4 of the Affidavit of Mr. H. R. Stewart, there is set out an excerpt from the testimony of Mr. C. D. Mackay, Vice President Southern Railway Company, before an Emergency Board appointed by the President to deal with the threatened strike of railroad employees; and in that testimony, Mackay referred to Decisions 126, 1239, 1433, 1694 and 2271 of Railroad Adjustment Board No. 1, which permitted the deduction of outside earnings. However, neither Mr. Mackay in his testimony nor Mr. Stewart in his Affidavit pointed out that these decisions were made by a board which existed long before the passage of the present Railway Labor Act in 1934 or the passage of that Act in its original form in 1926; nor did Mr. Stewart point out that these decisions were made before the Railroad Company had its first contract with Affiant's Brotherhood. Affiant has examined those decisions, and they do not disclose what contract between the union and the railroad company, if any, was involved, nor the terms of same, or whether the contract provided for the deduction of outside earnings or what their provisions contained in respect of awards for discipline. Awards 404, 428, 465 and 1055 of the First Division of the National Railroad Adjustment Board, referred to by Mr. Mackay in his testimony, and

included in the Stewart Affidavit, were not awards involving the Louisville & Nashville Railroad Company and its employees; and they do not show the terms of the contract between the unions and the railroad companies involved under which the respective awards were made.

Such decisions as those referred to in Mackay's testimony can be of no value to a court unless it knows whether or not they were based upon a contract between the union and the railroad involved and what the discipline provisions of such contracts were. Various provisions concerning awards in disciplinary cases are contained in different contracts. As has already been shown, Article 31 (f) of the contract between Affiant's Brotherhood and the Railroad Company provides that if the discipline is not sustained, it will be cancelled "and the fireman in question will be paid for any time lost by him **resulting from the investigation or action taken.**" (Emphasis added.) Some contracts provide that if the discipline is not sustained, the employee will be reinstated and paid for "loss of earnings" occurring during the time he has been improperly held out of his job. Still other contracts contain a provision that if the discipline is not sustained, the employee shall be reinstated and "made whole" for any loss he sustained because of the wrongful discipline administered. Of course, if, while an employee is held out of his job, he has made as much or more than he would have made in his job, he has sustained no loss of earnings as represented by the difference in the amount he earned while off his job and what he would have earned on his job. Again, to make an employee "whole," it would be necessary for the railroad to pay him such a sum as when added to his outside earnings would equal what he would have made on his job. Such contract provisions are vastly different from the provisions of Article 31 (f).

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The Affidavits of G. C. Howard, A. J. Stierstaeder and J. B. Clark, filed by the Railroad Company, are in large part repetitions of the statements contained in the Affidavits of W. T. Wallace and H. R. Stewart; and what this Affiant has said with reference to the Affidavits of Wallace and Stewart, insofar as applicable, is intended to apply to the Affidavits of Howard, Stierstaeder and Clark.

This September 2, 1960.

(s) Jake Paschall.

Subscribed and sworn to before me by Jake Paschall this September 2, 1960.

My commission expires December 3, 1960.

Notary Public,
State-at-large, Kentucky.

ORDER.

This action is submitted on the record and the briefs of the parties have been considered.

The case of The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al., No. 6796, decided July 27, 1960, by the United States District Court for the District of Colorado, and the authorities cited in that opinion by Judge Chilson require that the preliminary injunction granted in this action be made permanent.

It Is Therefore Ordered that counsel for plaintiff, Louisville and Nashville Railroad Company, submit detailed findings of fact and conclusions of law and tender judgment.

December 20, 1960.

Henry L. Brooks,
United States District Judge.

MOTION.

The Defendants, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, move the Court to withdraw and set aside the Order entered herein on December 20, 1960, and to permit the Plaintiff and the Defendants to each submit proposed findings of fact and conclusions of law; and that upon consideration of the entire record and of the proposed findings of fact offered by the respective parties the Court make findings of fact and conclusions of law as required by Federal Rules of Civil Procedure 52; and they tender herewith for filing their proposed findings of fact and conclusions of law.

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Attorneys for the Defendants.

As one of the counsel for the Defendants, I certify that a copy of the foregoing Motion and the Defendants' proposed findings of fact and conclusions of law, together with notice that same would be presented to the Court for action on Tuesday, January 10, 1961, at the hour of 10 o'clock A. M., were this day delivered to Mr. John Sandidge, attorney of record for the Plaintiff, Louisville and Nashville Railroad Company, this January 7, 1961.

_____

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1.

Each of the defendants, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, and Brotherhood of Railroad Trainmen, is a national unincorporated labor organization consisting of operating railroad employees on the different railroad lines of the United States, including the lines of the plaintiff, Louisville & Nashville Railroad Company; and each of the defendant unions is certified under the Railway Labor Act as the collective bargaining representative of its members employed by the plaintiff in the operation of its railroad lines, and each has so acted for many years.

2.

The plaintiff Railroad Company is now operating its lines of railroad under a contract arrived at by collective bargaining with each of the defendant unions, and there have been such contracts so arrived at for many years last past.

3.

The first such contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen, was made on or about August 1, 1919; and on or about the date, the plaintiff Railroad Company made contracts with each of the other defendant unions and it has had such collective bargaining contracts with each of the defendant unions continuously from that date to the present time.

4.

Article 31 of the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen which was in effect at the time this case originated and was heard, and which is now in effect, provides the procedure to be followed when the plaintiff Railroad Company deems it necessary to discipline a fireman by demerit or discharge, and also fixes the liability of the plaintiff Railroad Company if the disciplinary action taken by it is not finally sustained. Paragraph (f) of Article 31 provides:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

5.

Every contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen, beginning with the first contract executed on or about August 1, 1919, has contained a provision in the article dealing with disciplinary procedure against employee members of the defendant, Brotherhood of Locomotive Firemen and Enginemen in language identical to that contained in Paragraph (f) of Article 31 of the present contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen.

6.

A provision in substantially identical language to that used in Paragraph (f) of Article 31 of the present contract between the plaintiff Railroad Company and the defendant,

Brotherhood of Locomotive Firemen and Enginemen is contained in the present contract between the plaintiff Railroad Company and that of each of the other three defendant unions, and has been in every prior contract between each of the other three defendant unions and the plaintiff Railroad Company from the date of the first contract between them.

7.

The provision in the present contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Engineers corresponding to Paragraph (f) of Article 31 of the contract between the plaintiff Railroad Company and the defendant Firemen's union provides:

> "If the discipline administered is not sustained, it will be cancelled and the party in question will be paid for any time lost by him resulting from the investigation or action taken."

A provision in substantially identical language has been in every prior contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Engineers.

8.

The provision in the present contract between the plaintiff Railroad Company and the defendant, Brotherhood of Railroad Trainmen corresponding to Paragraph (f) of Article 31 of the contract between the plaintiff Railroad Company and the defendant Firemen's union provides:

> "In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

A provision in substantially identical language has been in every prior contract between the plaintiff Railroad Company and the defendant, Brotherhood of Railroad Trainmen.

9.

The provision in the present contract between the plaintiff Railroad Company and the defendant, Order of Railway Conductors and Brakemen corresponding to Paragraph (f) of Article 31 of the contract between the plaintiff Railroad Company and the defendant Firemen's union provides:

> "In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

A provision in substantially identical language has been in every prior contract between the plaintiff Railroad Company and the defendant, Order of Railway Conductors and Brakemen.

10.

On August 8, 1952, in a labor dispute between the plaintiff, Louisville and Nashville Railroad Company and the defendant, Order of Railway Conductors and Brakemen, pending before the First Division of the National Railroad Adjustment Board, Docket No. 28,562, the First Division of the National Railroad Adjustment Board, which had jurisdiction of the parties and of the dispute there involved, with jurisdiction to construe the contract between the parties, construed the provision in the contract between the plaintiff, Louisville and Nashville Railroad Company, and the defendant, Order of Railway Conductors and Brakemen, quoted in Finding No. 9 as denying to the plaintiff Rail-

road Company the right to deduct outside earnings in the settlement of awards made in discipline cases. That decision in the records of the First Division of the National Railroad Adjustment Board is designated as Award No. 15,655. A correct copy of the decision and award in that case is filed with the Supplemental Affidavit of L. G. Mulinix, and a correct copy thereof is also filed as Exhibit "F" to the Affidavit of W. T. Wallace, a witness for the plaintiff Railroad Company.

11.

During all of the time the plaintiff Railroad Company has had collective bargaining contracts with each of the defendant unions, it has never settled any award in favor of any member of the defendant unions in a discipline case by deducting from the amount of wages which the disciplined employee would have earned had he not been discharged or suspended, any sum of money he may have earned from outside employment during the period he was suspended from railroad service by reason of the wrongful disciplinary action taken against him by the plaintiff Railroad Company. Prior to the inception of the Humphries case, the plaintiff Railroad Company never made to any of the defendant unions, or to any of their officers, any claim of right to make any such deduction in the settlement of money awards in discipline cases; and at no time has there been any tacit understanding between the plaintiff Railroad Company and the defendant unions, or either of them, that in practical operation the provisions of their respective contracts dealing with the settlement of money awards in discipline cases should be construed as permitting the deduction of outside earnings.

12.

On July 27, 1945, the plaintiff Railroad Company, as authorized and provided by Section 6 of the Railway Labor Act, served notice on the general chairman (L & N System) of each of the defendant unions of its desire to rewrite certain provisions of its existing contract with each of the defendant unions. The changes desired by the plaintiff Railroad Company were listed by numbered items in a document marked "Attachment A" accompanying the notice. Item 20 of "Attachment A" specified the change which the plaintiff Railroad Company desired to make in the method of computing the amount to be paid in the settlement of awards in discipline cases and read as follows:

"PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS

"Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due.

"For the purpose of this rule self-employment shall not be considered as 'other employment.'

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated.

"Where no rule, regulation or interpretation as to the above proposal exists on this carrier, the fact that the subject matter is included in this uniform proposal is not to be construed as an admission to the contrary."

Conferences were had on the property between the plaintiff Railroad Company and the defendant unions which resulted in no agreement; and by agreement, the matter then was submitted to a National Conference Committee, but the plaintiff Railroad Company was unable to obtain

any change in its contract with either of the defendant unions so as to permit the deduction of outside earnings in the settlement of awards in discipline cases as it indicated in Item 20 of "Attachment A" it desired.

13.

On June 20, 1947, the plaintiff Railroad Company again made an effort to negotiate a change in its existing contracts with the four defendant unions so as to permit the deduction of outside earnings in the settlement of money awards in discipline cases. On that date, it served a notice in the form of a letter upon the General Chairman (L & N System) of each of the defendant unions notifying the addressees of "our intention to change existing rules, regulations, interpretations or practices however established to the extent and as shown in attachment marked 'A'." "Attachment A", which accompanied the letter, itemized a great many changes in its existing contracts with the four defendant unions which the plaintiff Railroad Company desired. Item 18 of "Attachment A" read as follows:

"PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS

"Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due.

"For the purpose of this rule self-employment shall not be considered as 'other employment.'

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated.

"Where no rule, regulation or interpretation as to the above proposal exists on this carrier, the fact that

the subject matter is included in this uniform proposal is not to be construed as an admission to the contrary."

Following the receipt of that letter and "Attachment A" accompanying same, a meeting was held between the representatives of the defendant unions and of the plaintiff Railroad Company but no agreement was reached; and thereupon the matter was submitted to a National Conference Committee. After protracted hearings the plaintiff Railroad Company was unable to secure any agreement to make the changes desired by it as set out in Item 18 of "Attachment A", but the provisions of the existing contracts between the defendant unions and the plaintiff Railroad Company with reference to the settlement of money awards in discipline cases remained unchanged.

14.

On March 31, 1956, B. G. Humphries, a member of the defendant, Brotherhood of Locomotive Firemen and Enginemen, and employed as a fireman on the plaintiff Railroad Company's system, was discharged by the plaintiff Railroad Company on the alleged ground that he had assaulted two other employees of the plaintiff Railroad Company while on duty. The defendant Brotherhood protested his discharge and, as provided in the contract between the defendant Brotherhood and the plaintiff Railroad Company and as provided in the Railway Labor Act, the matter was processed up to the highest officer of the plaintiff Railroad Company designated to handle such matters, but without any agreement or adjustment of the grievance being effected.

15.

The processing of the Humphries complaint through the regular channels provided in the contract and in the Rail-

way Labor Act consumed something like a year, but when it finally became evident to the officers of the defendant Brotherhood that the plaintiff Railroad Company had no intention of adjusting the grievance by restoring Humphries to his position and paying him for the time he had been required to lose by the disciplinary action against him, a strike vote was taken by his Brotherhood in accordance with the provisions of its charter, with the result that the members of the defendant Brotherhood employed on the plaintiff Railroad Company's system authorized the calling of a strike on account of the Humphries grievance.

16.

With knowledge that such a strike referred to in Finding No. 15 had been authorized, the plaintiff Railroad Company, on June 13, 1957, filed with the First Division of the National Railroad Adjustment Board its ex-parte submission entitled:

> "In the Claim of the Brotherhood of Locomotive Firemen and Enginemen described as follows: Request that Fireman B. G. Humphries, Louisville Main Stem, First Division, be reinstated to service with former seniority unimpaired and paid for all time lost under Article 31."

At the time that submission was made, it was the purpose of the plaintiff Railroad Company, in event the disciplinary action of the plaintiff Railroad Company against Humphries was not sustained and he was ordered to be reinstated with pay for time lost, to make deduction from the sum due for time lost any outside earnings Humphries had made during the time he was out of the service of the plaintiff Railroad Company, but that intention was not made known to Humphries or to the defendant, Brotherhood of

Locomotive Firemen and Enginemen, and in its submission of the controversy to the First Division of the National Railroad Adjustment Board, and in presenting the matter to the Adjustment Board, the plaintiff Railroad Company made no claim of right to deduct outside earnings in event the ruling of the Board was against it, and did not ask the Adjustment Board to decide whether it did or did not have the right to make such deduction, although had the matter been presented to the Adjustment Board that body had jurisdiction to determine that question.

17.

The defendant, Brotherhood of Locomotive Firemen and Enginemen responded to the submission of the plaintiff Railroad Company referred to in Finding No. 16 by submitting to the Board what the defendant Brotherhood claimed to be the facts on the only questions submitted to the Board, which were whether Humphries was wrongfully discharged and if so, whether he should be restored to his job with pay for lost time.

18.

On May 14, 1958, the Board disposed of the submission referred to in Finding No. 16 by Award No. 18720, the pertinent part of which reads as follows:

> "Claim sustained with pay for time lost as the rule is construed on the property"

and on the same day, an order was entered by the First Division of the National Railroad Adjustment Board directing that its order be complied with on or before June 14, 1958.

19.

The plaintiff Railroad Company complied with that portion of the Humphries award directing his reinstatement, but did not pay him for time lost.

20.

After the Humphries award had been made, the General Chairman (L & N System) of the defendant, Brotherhood of Locomotive Firemen and Enginemen made repeated demands upon representatives of the plaintiff Railroad Company that the latter comply with the money part of the Humphries award by paying Humphries in full for the time he had lost from his job during the period he was laid off, but without success, the representatives of the plaintiff Railroad Company advising the General Chairman that it would not settle the award on any basis other than by deducting from the amount Humphries would have earned had he not been laid off from the railroad job such sums as he had earned from other employment during that period. The General Chairman of the Brotherhood notified the plaintiff Railroad Company that such a settlement of the award was wholly unacceptable. Nevertheless, the plaintiff Railroad Company persisted in its position, and its representatives notified the General Chairman of the defendant Firemen's Brotherhood, that henceforth it intended to make such deduction of outside earnings in the settlement of all money awards in discipline cases whether the employee was a member of the defendant Firemen's Brotherhood or a member of one of the other defendant unions.

21.

Feeling that the declared intention of the plaintiff Railroad Company to deduct outside earnings in the settlement

of money awards in all discipline cases if carried out would be violative not only of the provisions of Article 31 (f) of the contract of the plaintiff Railroad Company with the defendant Firemen's union but also of corresponding provisions in the contracts between the plaintiff Railroad Company and each of the other defendant unions, and that, therefore, not only the members of his Brotherhood but also the members of the other defendant unions employed on the plaintiff's railroad system were vitally interested in the issue presented by the attempt of the plaintiff Railroad Company to make such deduction in the Humphries case, the General Chairman of the defendant Firemen's Brotherhood called upon the General Chairmen (L & N System) of the other defendant unions to cooperate with him in an effort to induce the plaintiff Railroad Company to recede from its position and to settle the Humphries award without the deduction of outside pay and to induce the plaintiff Railroad Company to agree that no such deduction was authorized by Article 31 (f) of the contract between the plaintiff Railroad Company and the defendant Firemen's Brotherhood or by corresponding provisions in its contracts with the other defendant unions.

22.

The General Chairman (L & N System) of the other unions agreed to cooperate with the General Chairman of the defendant Firemen's Brotherhood in an attempt to induce the plaintiff Railroad Company to recede from its position in the Humphries case and in respect of its declared intention that in the future it would interpret the discipline rules in the agreements with the four defendant unions as authorizing the deduction of outside earnings from the wages owed to employees when it has been determined that they have been improperly held out of service

and are returned to their employment and paid for lost services.

23.

Conferences were held between representatives of the plaintiff Railroad Company and the General Chairmen (L & N System) of the defendant unions on July 7 and July 30, 1958, but they were barren of any results, the plaintiff Railroad Company persisting in its position that it would settle the Humphries award and any awards in future discipline cases only on the basis of deducting outside earnings.

24.

Following the unproductive conference of July 30, 1958, the members of the four defendant unions employed on the L & N System, by a vote taken in accordance with the charter of their respective unions, authorized the calling of a strike for the purpose of inducing the plaintiff Railroad Company to comply with the Humphries money award without any deduction of outside earnings and to abandon its claimed right to deduct outside earnings in the settlement of money awards in future discipline cases.

25.

The plaintiff Railroad Company, on September 23, 1958, filed with the First Division of the National Railroad Adjustment Board a submission entitled "First Division Award 18,720 Request For Interpretation," such submission being for the purported purpose of having the First Division of the National Railroad Adjustment Board determine if the plaintiff Railroad Company was entitled to deduct his outside earnings in settling the Humphries award No. 18,720.

26.

On December 17, 1958, the First Division of the National Railroad Adjustment Board rejected the request of the plaintiff Railroad Company for an interpretation of the Humphries award No. 18, 720, on the ground that the question of the right of the plaintiff Railroad Company to deduct outside earnings could have been raised in its original submission of the Humphries controversy on June 13, 1957, and that having failed to present the question on that submission, the plaintiff Railroad Company was precluded from raising the question as was attempted in the submission of September 23, 1958.

27.

Following the rejection and dismissal of the submission of September 23, 1958, as set out in Finding No. 26, the General Chairmen (L & N System) of the four defendant unions requested another conference with the plaintiff Railroad Company representatives in a final effort to settle the Humphries controversy without calling the strike authorized as set out in Finding No. 24; and such a conference was held on January 23, 1959. However, at that conference, the plaintiff Railroad Company, through its representatives, refused to recede from its repeatedly announced intention with reference to the deduction of outside earnings in settlement of the Humphries award and in the settlement of all other money awards in discipline cases.

28.

On January 23, 1959, the same day on which the conference referred to in Finding No. 27 took place, the plaintiff Railroad Company filed with the First Division, National Railroad Adjustment Board, still another submission in the Humphries controversy in which the plaintiff Rail-

road Company again attempted to secure from the First Division of the National Railroad Adjustment Board a ruling in respect of its alleged right to deduct outside earnings in the settlement of the Humphries award on the theory that that submission presented to the Board an entirely new issue not involved in the original submission of June 13, 1957.

29.

On February 9, 1959, the General Chairman (L & N System) of the four defendant Brotherhoods issued a call to their members who were employed on the L & N System, as they had been authorized to do, as set out in Finding No. 24, to go out on a strike on February 13, 1959, on account of the failure and refusal of the plaintiff Railroad Company to comply with the Humphries money award.

30.

On February 12, 1959, this action was instituted by the plaintiff Railroad Company against the four defendant unions and their General Chairman, individually and in their official capacities, in which the plaintiff Railroad Company sought to enjoin the defendants from putting into effect the strike which had been called for February 13, 1959, and from taking any of the steps usually taken in the prosecution of such a strike, on the ground that the controversy in respect of which the strike had been called was then pending undisposed of before the First Division of the National Railroad Adjustment Board, and was prohibited by the provisions of the Railway Labor Act. A temporary restraining order was issued followed by a temporary injunction.

31.

Had the temporary injunction not been granted, as set out in Finding No. 30, the members of each of the defend-

ant unions employed on the L & N System would have gone out on strike on February 13, 1959 in accordance with the call therefore issued on February 9, 1959, as set out in Finding No. 29.

32.

On December 9, 1959, the First Division of the National Railroad Adjustment Board dismissed the submission filed by the plaintiff Railroad Company on January 23, 1959, as set out in Finding No. 28, on the ground that it was an attempt to resubmit an issue which properly should have been submitted in the submission of June 13, 1957 which resulted in Award No. 18,720 in favor of Fireman Humphries, and would violate the established rule of the First Division against submitting controversies by piece-meal. Exhibit "H" to the original Affidavit of Jake Paschall filed herein is a correct copy of the opinion of the Board dismissing the submission.

33.

Following the dismissal by the First Division of the National Railroad Adjustment Board of the plaintiff Railroad Company's submission of January 23, 1959, as set out in Finding No. 31, the defendant unions filed a motion to dissolve the temporary injunction issued, as set out in Finding No. 30, on the ground that inasmuch as the temporary injunction had been granted and continued in force because of the pendency of that submission of January 23, 1959 before the First Division of the National Railroad Adjustment Board, and inasmuch as that submission had been finally disposed of leaving no part of the Humphries controversy pending before such Board, the Court was without authority to continue the temporary injunction in force and without authority to make same permanent.

CONCLUSIONS OF LAW.

1.

The plaintiff, Louisville and Nashville Railroad Company, is a "carrier" within the meaning of the Railway Labor Act.

2.

Each of the defendant unions is a "representative", and the members of each of the defendant unions employed on the L & N System are "employees", within the meaning of the Railway Labor Act; and the Court has jurisdiction of this action and of the parties thereto.

3.

The controversy between the parties in respect of the Humphries award involves and grows out of a labor dispute within the meaning of the Norris-LaGuardia Act, and each of the defendant unions and their members who are employees of the plaintiff Railroad Company on its railroad lines are parties to, interested in, and are participating in that labor dispute within the meaning of the Norris-LaGuardia Act.

4.

The grievance in respect of the discharge of Fireman Humphries was processed by the defendant, Brotherhood of Locomotive Firemen and Enginemen, in his behalf "on the property" up to and including the highest officer of the plaintiff Railroad Company designated by the plaintiff Railroad Company to handle such matters, in strict accord with the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen, and in conformity to the provisions and the requirements of Section 3 First (i) of the Railway Labor Act [45 U.S.C. Sec. 153, First (i)].

5.

The defendant unions were prohibited by law from setting up and maintaining any strike on account of the conduct of the plaintiff Railroad Company in respect of the Humphries matter so long as that controversy was pending undisposed of before the National Railroad Adjustment Board; but after the National Railroad Adjustment Board finally disposed of that controversy by its order of December 9, 1959, there was then no statutory or other prohibition against the defendant unions setting up and maintaining a strike for the purpose of inducing the plaintiff Railroad Company to settle the Humphries award without the deduction of his outside earnings, and to recede from its announced purpose to make such deduction in the settlement of all future awards in discipline cases.

6.

Irrespective of whether the civil action to enforce a money award provided by Section 3, First (p) of the Railway Labor Act [45 U.S.C. Sec. 153, First (p)] was the exclusive judicial remedy available to Humphries and his Brotherhood to enforce the money award in his favor made by the First Division of the National Railroad Adjustment Board, that provision of the Railway Labor Act does not preclude the defendant, Brotherhood of Locomotive Firemen and Enginemen, and the three other defendant unions from having recourse to a strike of their members who are employees of the plaintiff Railroad Company in an attempt to induce the plaintiff Railroad Company to abandon its claim of right to settle money awards in discipline cases by the deduction of outside earnings, and to induce the plaintiff Railroad Company to settle the Humphries award without making any such deduction; and inasmuch as no feature of the Humphries controversy, including the

claimed right of the plaintiff Railroad Company to deduct outside earnings in settling such money awards is now pending before the National Railroad Adjustment Board, such a strike on the part of the defendant unions would not be an unlawful strike within the meaning of the Railway Labor Act or the Norris-LaGuardia Act.

7.

To construe the Railway Labor Act as not prohibiting a strike by a union over a dispute between a Railroad Company and the union which is not pending before the National Railroad Adjustment Board, but which has been finally disposed of by that tribunal, does not operate to deprive the Railroad Company of its property without due process of law in violation of the Fifth Amendment to the Federal Constitution.

8.

The refusal of the plaintiff Railroad Company to settle the Humphries money award without the deduction of outside earnings was willful, arbitrary and capricious and was not supported by any custom or practice "on the property" or by any mutual construction by the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen of Article 31 (f) of the contract between them, and amounted to a deliberate breach of its contract with the defendant, Firemen's Brotherhood.

9.

The unsuccessful attempt of the plaintiff Railroad Company under its Section 6 notice of July 27, 1945 referred to in Finding No. 12, and under its Section 6 notice of June 20, 1947, referred to in Finding No. 13, constitute a conclusive recognition on the part of the plaintiff Railroad Company that its contracts with neither of the defendant

unions permitted the deduction of outside earnings in the settlement of awards in discipline cases.

10.

The decision of the First Division of the National Railroad Adjustment Board set out in Finding No. 10, to the effect that the provision of the contract between the plaintiff Railroad Company and the defendant, Order of Railway Conductors and Brakemen set out in Finding of Fact No. 9 does not permit the plaintiff Railroad Company to deduct outside earnings in discipline cases involving members of the defendant, Order of Railway Conductors and Brakemen in the service of the plaintiff Railroad Company, is not only conclusive against the plaintiff Railroad Company in respect of its right to deduct outside earnings in discipline cases involving Conductors and Brakemen, but because of the substantial identity in language of the corresponding provision in the contracts of the other three defendant unions with the plaintiff Railroad Company, that decision is conclusive as to the meaning of the corresponding provisions in the contracts of each of the other three defendant unions with the plaintiff Railroad Company.

11.

By virtue of the facts set out in Findings 10, 11, 12 and 13 and Conclusions of Law Nos. 8, 9 and 10, the plaintiff Railroad Company does not come into this Court with clean hands; and irrespective of what otherwise might have been its right to an injunction against the threatened strike, it is not entitled to the assistance of this Court to prevent the threatened strike.

AMENDED ANSWER.

The defendants, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen, by leave of Court, and for the purpose of making their pleadings conform to the proof, amend their answer herein, and by way of amendment, reiterating and adopting each of the allegations and denials contained in their original answer and in their answer to the amended complaint, state:

1.

Article 31 of the contract between the plaintiff, Louisville and Nashville Railroad Company, and the defendant, Order of Railway Conductors and Brakemen, which was in effect for some time prior to August 8, 1952, and which has been in effect at all times since that date, provides the procedure to be followed when the Railroad Company deems it necessary to discipline an employee who is a member of the Order of Railway Conductors and Brakemen by demerit or discharge, and also fixes the liability of the plaintiff Railroad Company if the disciplinary action taken by it is not finally sustained. Paragraph 2 of that Article, in part, provides:

> "In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

2.

The contract between the Louisville and Nashville Railroad Company and the defendant, Brotherhood of Railroad Trainmen, which was in effect on and prior to August 8,

1952, and has been in effect at all times since then, contains a provision in language identical to that contained in Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen set out in Paragraph 1 of this Amended Answer.

3.

The contract between the Louisville and Nashville Railroad Company and the defendant, Brotherhood of Locomotive Engineers, which was in force on August 8, 1952, and which has been in effect ever since, contains a provision corresponding to that provision in the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen set out in Paragraph 1 of this Amended Answer, and which reads as follows:

> Article 31(f). "If the discipline administered is not sustained, it will be canceled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken."

4.

The contract between the Louisville and Nashville Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen, which was in force on August 8, 1952, and which has been in effect ever since, contains a provision corresponding to that provision in the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen set out in Paragraph 1 of this Amended Answer, reading as follows:

> Article 31(f). "If the discipline administered is not sustained, it will be canceled, and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Amended Answer

5.

On August 8, 1952, there was pending before the First Division of the National Railroad Adjustment Board a labor dispute between the plaintiff Railroad Company and the defendant, Order of Railway Conductors and Brakemen, that dispute being docketed as No. 28,562. The First Division of the National Railroad Adjustment Board had jurisdiction of the parties to that dispute and of the subject matter thereof, including jurisdiction to construe the contract between the parties, including that part of Paragraph 2 of Article 31 quoted in Paragraph 1 of this Amended Answer, and each of the parties was properly before that tribunal. In that proceeding, on August 8, 1952, the First Division of the National Railroad Adjustment Board handed down its decision and award in which it construed the language of Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the defendant, Order of Railway Conductors and Brakemen set out in Paragraph 1 of this Amended Answer, as denying to the plaintiff Railroad Company the right to deduct outside earnings in the settlement of money awards made in discipline cases, including the money award involved in that proceeding. That decision in the records of the First Division of the National Railroad Adjustment Board is designated as Award No. 15,655. A true copy of that decision and award is attached hereto as a part hereof, marked Exhibit A.

6.

The decision and award No. 15,655 of the First Division of the National Railroad Adjustment Board in case docketed as No. 28,562, set out and referred to in Paragraph 5 of this Amended Answer is conclusive of the right of the plaintiff Railroad Company to make any deduction

of outside earnings in the settlement of money awards in discipline cases involving its employees who are members of the defendant, Order of Railway Conductors and Brakemen.

7.

Because of the identity of language in the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen construed by the First Division of the National Railroad Adjustment Board set out in Paragraph 1 of this Amended Answer, with the language contained in Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Railroad Trainmen set out in Paragraph 2 of this Amended Answer, the construction of Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen, as alleged in Paragraph 5 hereof, is conclusive as to the plaintiff Railroad Company in respect of the construction of Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Railroad Trainmen.

8.

The provision in the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Engineers, set out in Paragraph 3 of this Amended Answer, and the provision in the contract between the plaintiff Railroad Company and the defendant, Brotherhood of Locomotive Firemen and Enginemen, set out in Paragraph 4 of this Amended Answer, are so substantially identical with that portion of Paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the order of Railway Conductors and Brakemen set out in Paragraph 1 of this Amended Answer, and construed by

the First Division of the National Railroad Adjustment Board as denying to the plaintiff Railroad Company the right to deduct outside earnings in the settlement of money awards in discipline cases to its employees who are members of the Order of Railway Conductors and Brakemen, that there can be no good faith claim that the said provisions in those two contracts are susceptible of any different construction from that given by the First Division of the National Railroad Adjustment Board to the provision of paragraph 2 of Article 31 of the contract between the plaintiff Railroad Company and the Order of Railway Conductors and Brakemen as set out in Paragraph 5 of this Amended Answer; and the claim of the plaintiff Railroad Company of its right to make such deductions in the settlement of money awards in discipline cases involving its employees who are members of the Brotherhood of Locomotive Engineers and of the Brotherhood of Locomotive Firemen and Enginemen, and its attempt to make such deduction in the settlement of the Humphries money award, were and are fraudulent and not made in good faith.

9.

At no time has the contract between the plaintiff Railroad Company and either of the defendant unions been construed in practice, on the property, or by mutual agreement of the parties as permitting the Railroad Company to deduct outside earnings in the settlement of money awards in discipline cases.

10.

Because of all of the facts pleaded in this Amended Answer, the defendants state that the plaintiff Railroad Company does not come into this Court with clean hands and, therefore, it is not entitled to the protection of this Court by injunction or otherwise in its bad faith and fraudu-

lent attempt to settle the Humphries award by the deduction of his outside earnings.

Wherefore, premises considered, defendants pray that the temporary injunction heretofore granted be dissolved, that plaintiff take nothing by its complaint but that same be dismissed, and that they be adjudged their costs in this behalf expended.

Chas. I. Dawson,
1700 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Defendants.

Bullitt, Dawson & Tarrant,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,

Harold C. Heiss and Russell B. Day,
Keith Building,
Cleveland 14, Ohio,

V. C. Shuttleworth,
1120 Merchants Nat'l Bank Building,
Cedar Rapids, Iowa,

Weyland K. Sullivan,
Standard Building,
Cleveland 14, Ohio,

Harold McLaughlin,
1706 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel for Defendants.

DEFENDANTS' OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TENDERED BY PLAINTIFF.

Defendants make the following Objections to the Findings of Fact and Conclusions of Law submitted by counsel for plaintiff:

OBJECTIONS TO PROPOSED FINDINGS OF FACT.

Proposed Finding No. 5.

This proposed finding is defective and incomplete in that it asserts that the dispute is only between the plaintiff, L&N, and the defendant, BLF&E; whereas, while at its inception, the dispute was solely between those two parties, as the controversy between those two parties progressed, the other three defendant-unions became proper parties thereto, all as disclosed in Defendants' Proposed Findings of Fact.

Proposed Finding No. 9.

This proposed finding is inadequate and incomplete because it fails to set out the provisions of the contracts of the other three defendant-unions corresponding to the provision in the contract between the plaintiff railroad company and BLF&E set out in proposed Finding No. 9. In addition to plaintiff's proposed finding No. 9, there should be added as a part of that numbered finding proposed findings Nos. 7, 8 and 9 of the Defendants' Proposed Findings of Fact.

Proposed Finding No. 10.

This proposed finding is objected to because it is inadequate and not supported by the preponderance of the evidence, particularly that portion of the proposed finding which states that the Railroad Company's request of Fire-

man Humphries that he submit a statement of his outside earnings was in accordance with "a procedure it had followed in the past in such instances to obtain information for the purpose of deducting outside earnings." It is inadequate and incomplete in that it fails to state that the request that the Railroad Company made of Humphries to furnish information as to his outside earnings was the first time in the history of contract relations between the Railroad Company and the four defendant-unions that the defendant-unions and their responsible officers ever learned of any claim on the part of the Railroad Company of the right to deduct outside earnings in the settlement of money awards in discipline cases, all as shown by the affidavit of the General Chairman (L&N System) of each of the defendant-unions filed herein, and as set out in Defendants' Proposed Finding No. 11.

Proposed Finding No. 13.

This proposed finding is objected to because it does not state all of the pertinent facts concerning the July, 1958, conferences. It omits to state that at the conferences mentioned in that numbered finding the claimed right of the Railroad Company to deduct outside earnings in the settlement of all money awards in discipline cases was an active subject of discussion and dispute, and that fact should have been included as a part of proposed Finding No. 13, substantially as set out in Defendants' Proposed Findings Nos. 21, 22 and 23. That proposed finding is also defective in that it wholly omits and ignores the fact that the General Chairmen (L&N System) of the Brotherhood of Locomotive Engineers, The Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen attended and participated in that conference because they had an interest not only in the attempt of the Railroad

Company to deduct outside earnings in settling the Humphries money award but in the threat of the Railroad Company theretofore made and repeated at those conferences to deduct outside earnings in all future settlements of money awards in discipline cases.

Proposed Finding No. 19.

This proposed finding is objected to because the last sentence thereof reading: "This suggestion was rejected by the labor organizations" is not true. The preponderance of the evidence shows that the Railroad Company's representatives came to that conference with their submission to the National Railroad Adjustment Board already prepared, and made no request that the unions join in that submission.

Proposed Finding No. 23.

This proposed finding purporting to state the contents of the joint answer of the defendants is objected to because (first) that pleading speaks for itself, and there is no necessity for a finding concerning its contents; and (second) it does not correctly state the contents and purport of the defendants' original answer or that answer as amended to conform to the proof.

Proposed Finding No. 29.

This numbered proposed finding is objected to for the reason that it limits the defendants' claim of bad faith on the part of the Railroad Company solely to the refusal to settle the Humphries' money award without the deduction of outside earnings; whereas, the contention of the defendants was and is that the Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen and Brotherhood of Railroad Trainmen were interested in the dispute no only because of the refusal of the Railroad

Company to settle the Humphries award without the deduction of outside earnings but also because of the Railroad Company's declared intention of making similar deductions in the settlement of money awards in all discipline cases which involved members of either of those three unions.

Proposed Finding No. 30.

This proposed finding is objected to because it is wholly out of place in Findings of Fact and is nothing more than a brief in favor of the position of the plaintiff Railroad Company.

Proposed Finding No. 32.

This proposed finding is objected to because it is too restrictive in its statement of the purpose of the threatened strike, and because the last sentence of that proposed finding:

> "There is no dispute concerning this purpose of the threatened strike,"

is untrue.

OBJECTIONS TO PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW.

The defendants object to the following numbered proposed Conclusions of Law offered by the plaintiff Railroad Company:

Proposed Conclusion No. 2.

This proposed conclusion is objected to for the reason that the statement therein contained that

> "The dispute between the L&N and the BLF&E involving the claim of Fireman Humphries is a 'minor' dispute"

is incomplete. It fails to take note of the fact that there is a dispute between the parties over the attempt of the Railroad Company to unilaterally rewrite the provisions of Article 31(f) of the Firemen's contract in settling the Humphries' award and its claim of right to make similar deduction in the settlement of money awards in discipline cases to members of the other three defendant unions and its declared intention so to do. In this aspect, the controversy between the parties is a major dispute and should be so recognized in Conclusion No. 2.

Proposed Conclusion No. 3.

This proposed conclusion is objected to because it does not correctly state the law.

Proposed Conclusion No. 5.

This proposed conclusion is objected to because it is an incorrect statement of the applicable law.

Proposed Conclusion No. 6.

This proposed conclusion is objected to because it is an incorrect statement of the law.

Proposed Conclusion No. 7.

This proposed conclusion of law is objected to because it incorrectly states the law and incorrectly interprets the cases therein referred to.

Proposed Conclusions Nos. 8 and 9.

These proposed conclusions of law are each objected to for the same reason stated in objections to proposed conclusions Nos. 6 and 7.

Proposed Conclusion No. 10.

This proposed conclusion is objected to because it does not state the facts. The defendant BLF&E and the other

three unions have exhausted all of their administrative remedies in respect of the matters in dispute, and the judicial remedy provided by Section 3 of the National Railway Labor Act does not preclude or prevent a strike such as the one threatened in this case.

Proposed Conclusions Nos. 12, 13 and 14.

These proposed conclusions of law are each objected to because not supported by the applicable law.

Proposed Conclusion No. 15.

Plaintiff's proposed conclusion of law No. 15 is objected to because it is not true.

Proposed Conclusion No. 16.

This proposed conclusion is objected to because it is not true.

Proposed Conclusion No. 17.

This proposed conclusion is objected to in its entirety because it is based upon a wrong conception of the law and a disregard for the preponderance of the evidence.

Finally, the defendants ask that all of the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff Railroad Company, except those to which we have not filed specific objections, be rejected, and that the Court accept the proposed Findings of Fact and Conclusions of Law offered by the defendants.

Counsel for Defendants,
1700 Kentucky Home Life Bldg.,
Louisville 2, Kentucky.

Defendants' Objections to Proposed Findings of Fact, Etc.

I hereby certify that the foregoing Objections were served this 16th day of January, 1961 by delivering a copy to John Sandidge, 1805 Kentucky Home Life Building, Louisville 2, Kentucky, Counsel for Plaintiff.

ORDER.

A hearing on pending motions was held in chambers on January 10, 1961, and there appeared Mr. John P. Sandidge, Mr. M. G. Breetz, and Mr. M. D. Jones, for the plaintiff, and Mr. Charles I. Dawson and Mr. Edwin F. Schaeffer for the defendants.

Counsel having been heard and the Court being advised, defendants motion that the Court withdraw and set aside the Order entered herein on December 20, 1960, is hereby overruled. However, the defendants shall be permitted to tender for the consideration of the Court its proposed findings of fact and conclusions of law.

(s) Henry L. Brooks,
United States District Judge.

Date: 1/17/61

This is to certify that a copy of the order was delivered to counsel for Defendants, Chas. I. Dawson, on Jan. 17, 1961.

John P. Sandidge,
Attorney for Plaintiff.

ORDER.

A hearing on the defendants' objections to proposed findings of fact and conclusions of law tendered by the plaintiff was held in chambers on January 17, 1961. There appeared Mr. John P. Sandidge, Mr. H. G. Bretz and Mr. M. D. Jones, for the plaintiff, and Mr. Charles I. Dawson and Mr. Edwin F. Schaeffer, for the defendants.

Counsel having been heard and the Court being advised,

It Is Ordered:

1. That defendants' objections to proposed findings numbers 5, 9, 13, 23, 29, 30 and 32 and defendants' objections to plaintiff's proposed conclusions of law are overruled.

2. Defendants' objection to plaintiff's proposed finding No. 10 is sustained to the extent that it should include the finding that it has been the consistent position of the defendants that outside earnings are not to be deducted from money awards.

3. Defendants' objection to plaintiff's proposed finding No. 19 is sustained to exclude the last sentence of said finding.

4. The Court having also considered the proposed findings of fact and conclusions of law submitted by the defendant, declines to adopt any of such proposed findings of fact and conclusions of law except insofar as they may be included in the findings of fact and conclusions of law adopted by the Court.

(s) Henry L. Brooks,
United States District Judge.

January 17, 1961.

For the Plaintiff:

Mr. John P. Sandidge,
1805 Kentucky Home Life Bldg.,
Louisville, Kentucky,
Mr. H. G. Breetz,
Mr. M. D. Jones,
908 West Broadway,
Louisville, Kentucky.

For the Defendants:

Mr. Charles F. Dawson,
Mr. Edwin F. Schaeffer,
1700 Kentucky Home Life Bldg.,
Louisville, Kentucky.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

This cause coming on for a further and final hearing and the Court, having considered all pleadings, oral testimony, affidavits, exhibits, and the briefs and arguments of counsel, finds the facts and renders conclusions of law as follows:

FINDINGS OF FACTS.

1. The plaintiff (herein referred to as L&N or carrier) is a corporation organized and existing under the laws of Kentucky, and is a common carrier by railroad subject to the Railway Labor Act (45 U.S.C. Sec. 151, et seq.).

2. The defendants Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen (herein referred to as BLF&E, BLE, ORC&B and BRT, respectively, or as the

labor organizations) ~~are un~~incorporated labor organizations within the meaning of the Railway Labor Act. The BLF&E is the collective bargaining representatives for firemen and hostlers employed by plaintiff; the BLE is the collective bargaining representative for engineers employed by the plaintiff; the ORC&B is the collective bargaining representative for plaintiff's conductors and brakemen; and the BRT is the collective bargaining representative for trainmen employed by the plaintiff.

3. The defendants Jake Paschall, H. J. Roadcup, L. G. Mullinix and J. M. King are the General Chairmen, throughout the property of the plaintiff, of the BLF&E, BLE, ORC&B and the BRT, respectively. All of the employees of the plaintiff represented by the four labor organizations are defendants herein and are too numerous to name. The defendants Jake Paschall, H. J. Roadcup, L. G. Mullinix and J. M. King fairly and adequately represent herein all persons employed by the plaintiff as firemen and hostlers, engineers, conductors and brakemen, and trainmen, respectively.

4. By this action the plaintiff seeks a permanent injunction against a strike threatened by the four labor organizations to enforce a money award of the First Division, National Railroad Adjustment Board (herein referred to as Adjustment Board or Board) in a case involving Fireman B. G. Humphries.

5. This proceeding is the result of an actual case involving a dispute between the L&N and the BLF&E over the discharge of Fireman Humphries, a member of the BLF&E. Fireman Humphries was discharged from the service of the L&N on March 31, 1956, after a hearing on a charge of assaulting, on February 15, 1956, while he was off duty, two other employees of the L&N who were on duty and on the property of the carrier.

Findings of Facts and Conclusions of Law

6. On April 11, 1956, the General Chairman of the BLF&E, on behalf of Fireman Humphries, formally protested the dismissal in a letter to the Director of Personnel of the L&N and demanded that Humphries be restored to service with former seniority unimpaired and paid for time lost. This grievance was discussed between representatives of the BLF&E and the L&N during several conferences, the last of the conferences at this stage being held on or about June 7, 1957. The L&N refused to reinstate Humphries. During these conferences no discussion was had as to whether Mr. Humphries had earnings in outside employment or whether, if so, such earnings were to be considered in arriving at the amount of back pay that would be due the claimant should he be reinstated to service. Because the L&N would not accede to the demands to reinstate Humphries, the BLF&E threatened to call a strike.

7. On June 13, 1957, the L&N submitted the claim of Fireman Humphries to the Adjustment Board for its decision. The claim was submitted by the L&N to the Adjustment Board in the exact language as the claim had been submitted to the L&N by the General Chairman of the BLF&E. The claim, in both instances, was stated as follows:

> "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Article 31."

8. The regular members of the Adjustment Board could not agree as to whether this claim of Fireman Humphries should be denied or sustained and a referee was assigned to break the deadlock. On May 14, 1958, the Adjustment Board, with the referee sitting as a member, issued its Award 18720 which held:

"Claim sustained with pay for time lost as the rule is construed on the property."

On the same day, an order was entered by the Adjustment Board directing that its Award 18720 be complied with on or before June 14, 1958.

9. The evidence shows without contradiction that the rule referred to in Award 18720 is a part of Article 31 of the agreement between the L&N and the employees represented by the BLF&E, the specific section of the rule being Article 31(f) which provides as follows:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken.
>
> "Note: This section applies only where a fireman is held out of service on account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation."

10. On May 17, 1958, the Director of Personnel of the L&N ordered that Fireman Humphries be restored to the service. On the same date the L&N, following a procedure it had followed in the past in such instances to obtain information for the purpose of deducting outside earnings, requested that Fireman Humphries furnish the carrier with a statement of his earnings in other employment, if any, while out of L&N service. The General Chairman of the BLF&E was advised of this request by the L&N on the same date.

It has been the consistent position of the defendants that outside earnings shall not be deducted, and it has been the consistent position of the plaintiff that outside earnings shall be deducted.

Findings of Facts and Conclusions of Law

11. Fireman Humphries has failed and refused to furnish the L&N with any statement concerning his earnings in other employment while out of L&N service. The General Chairman of BLF&E, on May 20, 1958, advised the L&N's Director of Personnel that Award 18720 and Article 31(f) of the agreement did not authorize any deduction for earnings in outside employment and demanded that the L&N pay to Fireman Humphries the full amount he would have earned with the L&N without any deduction for earnings in outside employment.

12. On June 26, 1958, the Director of Personnel of L&N advised the General Chairman of the BLF&E, in part, as follows:

> "We have secured from our Accounting Department necessary data for determining what Mr. Humphries would have earned as fireman between March 31, 1956 and May 29, 1958, had he not been discharged, and are ready to discuss with you the money payment due him under Award 18720. But we certainly cannot agree with you that his outside earnings during the time he was out of L&N service should not be deducted.
>
> . . . . . .
>
> "Fireman Humphries has declined to furnish statement of his outside earnings. If and when this is done, we are ready to make whatever money payment may be due him under Award 18720."

13. During July, 1958, conferences were held on the property of the L&N concerning the dispute as to the meaning and proper application of Award 18720. The General Chairman of the BLF&E invited the General Chairmen of the BLE, ORC&B and the BRT to attend these conferences.

Findings of Facts and Conclusions of Law

Fireman Humphries is a member of the craft or class known on the railroad as "firemen" and he is a member of the BLF&E. His claim for reinstatement and back pay was submitted to the L&N by the BLF&E. The BLF&E alone represented Fireman Humphries before the Adjustment Board where the dispute involved only the provisions of the agreement between the L&N and the employees represented by the BLF&E. The BLF&E was the only labor organization that was a party to the dispute before the Adjustment Board in the case involving Award 18720.

Representatives of the BLE, ORC&B and the BRT were invited to attend the July, 1958 conferences by the General Chairman of the BLF&E, pursuant to "an agreement of the four Brotherhoods to cooperate in all complaints in respect to the application of awards by the First Division of the National Railroad Adjustment Board."

During these conferences the representatives of the four labor organizations urged representatives of the L&N to ignore any outside earnings Fireman Humphries may have had in applying Award 18720. The L&N representatives contended that, since the BLF&E and the L&N could not agree concerning the proper application of Award 18720 the matter should be referred to the Board for an interpretation pursuant to Section 3 First (m) of the Railway Labor Act. Such a proceeding had been followed by the carrier in a similar dispute between BRT and the Terminal Railroad Association of St. Louis in Award 11825, First Division of the Board. The BLF&E was unwilling to seek or join the L&N in seeking an interpretation of Award 18720 from the Board, and contended there was no bona fide dispute as to the meaning of the award. At the conclusion of the conference on July 30, 1958, the L&N was requested to furnish a written statement concerning its position in applying Award 18720.

Findings of Facts and Conclusions of Law

14. This request was complied with by the L&N by a letter dated August 9, 1958, from the carrier's Director of Personnel to the General Chairman of the BLF&E. This letter read, in part:

> "This letter has further reference to the case of Fireman B. G. Humphries who was restored to the service in June of this year in compliance with First Division Award 18720. It is being written at your request to confirm the several conferences we have had, the last one on July 30th, concerning our disagreement over the proper application of that part of the Award reading 'with pay for time lost as the rule is construed on the property'.
>
> . . . . . .
>
> "We have complied with that part of Award 18720 with respect to restoring Fireman Humphries to the service. We stand ready to comply with the balance of the Award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the Award may be determined."

15. During August, 1958, the representatives of the labor organizations commenced taking preliminary steps in order to call a strike for the purpose of compelling the L&N to comply with Award 18720 without any deduction of outside earnings.

16. On September 28, 1958, the L&N filed with the Board an ex parte "Request for Interpretation" of Award 18720, in which it was alleged that a dispute existed between the parties involving the proper application of the award in connection with determining the amount due the claimant for time lost. This "Request for Interpreta-

tion" set forth the nature of the dispute and requested the Board to clarify its Award 18720 with respect to pay for time lost.

17. The Executive Secretary of the Adjustment Board, by letter dated October 9, 1958, requested the General Chairman of the BLF&E to advise whether or not a dispute existed as to the meaning of Award 18720. The General Chairman, by letter dated November 14, 1958, opposed the carrier's "Request for Interpretation" and advised the Executive Secretary of the Board that, prior to the carrier's original submission, no issue had been raised on the property concerning outside earnings, that the carrier had not requested an Award permitting deduction of outside earnings, and that the petition for interpretation was, in fact, a presentation of a new case and a dispute not before the Board at the time it rendered Award 18720. This letter was concluded with the following paragraph:

> "This will advise you that there is no dispute on the part of the Brotherhood of Firemen and Enginemen as to the meaning or intent of Award 18720 and the carrier is simply attempting to have the Award changed in the guise of an interpretation."

18. On December 17, 1958, a divided Board with the referee sitting to break the deadlock, adopted the contentions advanced by the BLF&E and held as follows:

> "The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.
>
> "In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be de-

ded in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

"Facts and supporting data as to that issue were not included in the docket on which Award 18720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17500 and 'Interpretation' thereof."

19. A further conference was held on the property of the L&N on January 23, 1959, between representatives of the L&N and the four labor organizations. Representatives of the labor organizations again demanded that Fireman Humphries be paid wages without any deduction of outside earnings and advised that a strike date would be set if this were not done. L&N representatives declined to so apply the award and suggested that the controversy be resolved by submitting it to the Board as a new dispute.

20. On January 23, 1959, representatives of the L&N submitted the controversy ex parte to the Adjustment Board as a new dispute for its decision.

21. The General Chairmen of the four labor organizations, on February 10, 1959, sent the following telegram to the Director of Personnel of the L&N:

"TELEGRAM

Louisville, Ky. Feb. 10, 1959.

"W S Scholl Director Of Personnel Louisville & Nashville Railroad 908 West Broadway Lville

This Will Advise Employes Represented By BLE BLF&E ORC&B And BRT Will Withdraw From Carrier's Service At 12:00 Noon Friday February 13, 1959 In A Joint Legal Strike Approved And Authorized

By The Brotherhood's Chief Executives Due To Carrier's Adamant Insistance That Outside Earnings Of Fireman Humphries Must Be Deducted From Any Money Due Him Under Award 18720

R J Roadcup Jake Paschall L G Mulinix J M King"

On the same date, February 10, 1959, the Director of Personnel received the following telegram from the Executive Secretary of the National Mediation Board, Washington, D. C.:

"TELEGRAM.

Washington, D. C., Feb. 10, 1959

"W. S. Scholl, Dir Pers.
Louisville & Nashville Railroad Co. Lville

Following Wire Received From Messrs Brown, Gilbert, Paddock And Kennedy 'Strike Of Employes Represented By BLE, BLF&E, ORC&B And BRT On The Louisville And Nashville (Proper) Set For Twelve Noon Friday February 13, 1959 Account Refusal Of Carrier To Apply Award 18720 First Division NRAB. Please Accept This Telegram As Seventy-Two Hour Notice In Cases Of This Kind.' Please Wire Statement.

E. C. Thompson Exect Secy NMB"

22. The L&N instituted this proceeding on February 12, 1959 and sought a temporary restraining order and a preliminary injunction, to be made permanent on final hearing, to restrain and enjoin the threatened strike. A temporary restraining order was issued on February 12, 1959 and a hearing was set for February 18, 1959, on the question of the issuance of a preliminary injunction. By agreement of all the parties, an order was entered on February 17, 1959, continuing the temporary restraining order in effect as a preliminary injunction until the action was

determined by the Court on the merits. The case was assigned for trial on May 18, 1959.

23. The defendants then filed their joint answer, in which they allege that the Court is without jurisdiction to grant the injunctive relief. The joint answer also contains allegations that no bona fide dispute was pending before the Adjustment Board and that the carrier had acted in bad faith. The sole purpose of the strike by the four labor organizations is affirmatively alleged in their joint answer as a strike authorized for the "purpose of enforcing the award" and as a strike "called solely because of the plaintiff's refusal to comply with the plain provisions of an award entered by the National Railroad Adjustment Board."

24. On April 30, 1959, the plaintiff filed a motion for judgment on the pleadings upon the ground that the joint answer of the defendants constituted an admission by the defendants that the threatened strike was called for the purpose of enforcing a money award of the National Railroad Adjustment Board, and that the threatened strike constituted a violation of the Railway Labor Act.

25. This cause came on for hearing on May 18, 1959, on the carrier's motion for judgment on the pleadings and for final trial. Disposition of the motion for judgment on the pleadings was passed by the Court until such time as all proof had been heard. Testimony of witnesses was heard by the Court on May 18, 1959. Upon the call of the case on May 19, 1959, counsel for all parties appeared and agreed that the taking of proof should be suspended and the case passed until January 4, 1960, and each of the parties agreed that "it would promptly use its best efforts to secure an advancement by the National Railroad Adjustment Board, First Division, of the presently pending submission involving the claim of B. G. Humphries, to the end

that it may be disposed of by that Board on or before January 4, 1960." An order was entered by the Court in accordance with the agreement of the parties, and the case was passed until January 4, 1960.

26. On December 9, 1959, an equally divided Board with a referee sitting to break the deadlock, dismissed the L&N's submission of the controversy as a new dispute, holding that Award 18720 disposed of the claim of Fireman Humphries for reinstatement and back pay and that "the matter must be judged res judicata."

27. The defendants, on December 22, 1959, filed a motion to dissolve the "temporary injunction issued herein on February 12, 1959" on the ground that the carrier's submission before the Board had been disposed of and the Norris-LaGuardia Act prohibited "the continuance in force of the temporary injunction." On December 23, 1959, the plaintiff filed a motion for leave to file an amendment to the complaint, a copy of which was attached and served, "for the purpose of clarifying the allegations of the complaint." The amendment to the complaint contained detailed allegations in support of the carrier's contention that the strike for the purpose of enforcing Award 18720, a money award of the Adjustment Board, was a strike in violation of the Railway Labor Act. On May 31, 1960, the defendants filed their joint answer to the amendment to the complaint in which they denied all allegations except that they admitted that the threatened strike would cause the carrier irreparable injury. The amendment to the complaint was subsequently ordered filed.

28. By agreement of the parties, the Court entered an order permitting additional evidence to be introduced by affidavits. They are now completed and constitute a part of the record. On October 5, 1960, the parties concluded the filing of extensive briefs.

Findings of Facts and Conclusions of Law

29. The ultimate issues now before the Court for decision are shown by these basic contentions of the parties:

(a) The L&N contends that the threatened strike is to enforce Award 18720 of the Board and that a strike to enforce this money award is repugnant to the Railway Labor Act and unlawful.

(b) The contentions of the labor organizations are basically two-fold:

(1) They deny that the threatened strike violates the Railway Labor Act and is unlawful and allege that the Norris-LaGuardia Act deprives the Court of jurisdiction and power to issue the requested injunction; and

(2) They assert that the L&N has acted in bad faith in handling the Humphries claim and that no bona fide dispute exists as to the meaning of Award 18720 or Article 31(f) of the agreement, all in support of their contention that the Court, in the exercise of sound discretion, should refuse to grant equitable relief to the carrier in any event because it has "unclean hands".

30. A great deal of evidence has been introduced relative to the propriety of deducting outside earnings under Award 18720 or Article 31(f) of the agreement. The Court has considered all of this evidence to determine whether the L&N is guilty of bad faith or has "unclean hands" as charged by the defendants.

The Court, without purporting to make a finding as to whether or not outside earnings are properly deductible, does find that the L&N has exercised good faith and is not guilty of bad faith or of coming into Court with "unclean hands".

L&N was not required to accede to the unions' interpretation of Award 18720 and Article 31(f) of the agreement. When it became obvious that a disagreement existed as to the interpretation of that award, the L&N was justified in seeking to have it resolved by the National Railroad Adjustment Board. The evidence shows that the Adjustment Board had in the past made such interpretations of its awards and such procedure is provided for by the Railway Labor Act (45 U.S.C. Sec. 153, First (m)).

L&N has shown that its opinion of a right to deduct outside earnings was not a frivolous one nor "a wilful and perverse attempt to evade and violate the provisions of Article 31(f)" as contended by the defendants. The various opinions of the Adjustment Board, and the opinion of the Kentucky Court of Appeals in the Wells case (L&N v. Wells, 289 Ky. 700, 160 S. W. 2d 16) justified L&N's opinion. The record further shows that in previous discipline cases involving the defendant organizations, L&N has sought advice as to whether or not there were outside earnings, and the present General Chairman of the BLF&E had notice that such advice was sought.

Among the Adjustment Board awards involving the deduction of outside earnings is Award 16408 of the First Division which, in part, reads:

> "Among union-management agreements, some explicitly authorize such deductions and a few prohibit them; but most are silent on the question, being content either not to mention compensation for lost time or merely to state in general that such compensation shall be paid, but without defining explicity what is meant by 'compensation', 'lost time', or 'lost earnings'. We are of the opinion that, where an agreement is not explicit and where there is no controlling practice to the contrary on a property, a general rule mentioning

compensation for lost time of earnings shall be interpreted so as to permit or authorize deduction for earnings in outside employment. This is because we incline to the view, supported in import by law and by a number of awards of this Division, that the primary purpose of providing such compensation is to make the wronged employe whole. We think such an employe is made whole when he receives an amount of compensation from his primary employer plus wage income from one or more 'outside' employers equal to the amount he would have earned if he had worked steadily with the primary employer in the absence of wrongful deprivation of such work."

The defendants have conceded in their brief that a Court of Law would probably allow the deduction of outside earnings to be made. It was not bad faith on the part of the L&N to take a position that, concededly, has generally been held by the courts to be legally justifiable.

The fact that L&N, in national rules cases, had served Section 6 notices relative to a desired rewording of Article 31(f) does not show bad faith on its part in taking the position it has. The reason for serving such notices is adequately explained in the evidence. The effect of those notices is not as contended by defendants as is further shown by National Railroad Adjustment Board Award 16408 of the First Division which, in part, reads:

"It has been contended that, because the carriers sought from the railroad labor organizations a specific rule authorizing the deduction of outside earnings in such cases, the carriers have admitted that most present rules on the matter are to be interpreted as not allowing or authorizing such deductions. We are not persuaded that this conclusion is necessarily valid.

In our opinion the most that can be inferred from this move by the carriers is that most of the present rules are so general as to be susceptible of various and conflicting interpretations."

31. In accordance with the stipulation of the parties, the Court further finds that the carrier would suffer irreparable injury in the event of the strike. The amount involved exceeds $10,000.00 exclusive of interest and costs.

32. The Court finds that no court enforcement proceeding of Award 18720 has been filed pursuant to the provisions of Section 3 First (p) of the Railway Labor Act (45 U.S.C. Sec. 153 First (p)), and that the sole purpose of the threatened strike is to enforce Award 18720, a money award of the First Division, National Railroad Adjustment Board. There is no dispute concerning this purpose of the threatened strike.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter of the action.

2. The Railway Labor Act, as interpreted by the Supreme Court, recognizes two separate classes of railway labor disputes referred to as "major" disputes and "minor" disputes. The first class relates to disputes over the formation of collective agreements and look to the acquisition of rights for the future. "Minor" disputes contemplate the existence of an agreement and are controversies as to rights accrued, usually involving only one employee. The dispute between the L&N and the BLF&E involving the claim of Fireman Humphries is a "minor" dispute. Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711; Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

3. By the enactment of the Railway Labor Act Congress has provided a complete statutory plan for the orderly

and peaceful settlement of such "minor" disputes. Among the expressly stated purposes of the Act are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein"; and ". . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or appliction of agreements covering rates of pay, rules, or working conditions." Sec. 2 (45 U.S.C. Sec. 151a).

4. Section 3 First (m) of the Railway Labor Act (45 U.S.C. Sec. 153 First (m)) provides that the Adjustment Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Award 18720 of the First Division, National Railroad Adjustment Board, is a "money award" which falls within the exception of Section 3 First (m) of the Act and does not constitute a "final and binding award."

5. Additional procedure for the orderly and peaceful settlement of "minor" disputes beyond the rendering of the Board's award are expressly provided for in the Act. In case of dispute involving an interpretation of the award either party may request the Division to interpret the award in the light of the dispute. Section 3 First (m). In case of an award favorable to a claimant, the Division shall make an order, directed to the carrier, to make the award effective and, if the payment of money is required, to pay such sum to the employee. Section 3 First (o). If the carrier does not comply with an order, enforcement may be sought in a suit by, as here, the BLF&E or Humphries, in a District Court of the United States as provided in Section 3 First (p) of the Act (45 U.S.C. Sec. 153 First (m), (o) and (p)).

6. The enforcement suit provided by Section 3 First (p) of the Act is an integral part of the entire statutory

plan for the complete and final settlement of such a "minor" dispute as is involved here.

7. "The specifications of one remedy [in the Railway Labor Act] normally excludes another." Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 297; Union P. R. Co. v. Price, 360 U. S. 601.

8. The existence of the complete statutory scheme for the orderly and peaceful settlement of such "minor" disputes cannot realistically be squared with the contention that Congress did not purpose to foreclose strikes, such as the one involved here, called solely for the purpose of enforcing a money award of the National Railroad Adjustment Board. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369 (D.C., Colo., 1960).

9. Congress having expressly provided a means of enforcement of the Board's award by the detailed provisions of Section 3 First (p) of the Railway Labor Act, the prescribed procedure excludes any other means of enforcement, including enforcement by strike. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369 (D.C., Colo., 1960).

10. The purpose of the strike is to force the carrier to pay a "money award" without the defendant BLF&E's securing a judgment of a proper District Court of the United States under Section 3 First (p) of the Railway Labor Act. The BLF&E has failed to exhaust its remedies under the Railway Labor Act, and the threatened strike is in violation of that statute.

11. The Norris-LaGuardia Act (29 U.S.C. Sec. 101, et seq.) has not withdrawn the power of federal courts to issue injunctions in labor disputes in all instances. The "Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act

so that the obvious purpose in the enactment of each is preserved." Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

12. In this instance the specific provisions of the Railway Labor Act takes precedence over the earlier and more general provisions of the Norris-LaGuardia Act. The Court has jurisdiction and power to issue necessary injunctive orders to vindicate the processes of the Railway Labor Act. Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 U. S. 30.

13. This Court has jurisdiction and power, notwithstanding the provisions of the Norris-LaGuardia Act, to issue a decree enjoining the threatened strike called for the express purpose of enforcing Award 18720, a money award of the First Division, National Railroad Adjustment Board. Denver & Rio Grande W. R. Co. v. Brotherhood of R. Trainmen, 185 F. Supp. 369, and cases cited therein.

14. The BLF&E, the authorized representative of Fireman Humphries and a party to the Board proceeding in Award 18720, cannot lawfully strike to enforce this money award of the Adjustment Board. The Court concludes that the BLE, ORC&B and the BRT, none of which represent Fireman Humphries and none of which were parties to any of the proceedings before the Board, cannot lawfully strike to enforce Award 18720, notwithstanding the provisions of any agreement that may exist among the four labor organizations to the contrary.

15. Since the evidence does not support any finding that the carrier has acted in bad faith or has "unclean hands", this affirmative defense must be denied.

16. The carrier has exhausted all available remedies and has no adequate remedy at law.

Findings of Facts and Conclusions of Law

17. The Court concludes:

(a) The motion of the L&N for judgment on the pleadings should be overruled since the Court has considered the case on the merits.

(b) The defendants' motion to dissolve the "temporary injunction" should be denied.

(c) The plaintiff's prayer for a permanent injunction should be granted, and a permanent injunction should issue.

(s) Henry L. Brooks,
United States District Judge.

January 18, 1961.

JUDGMENT GRANTING INJUNCTION—Tendered January 11, 1961.

This cause having been submitted upon the Transcript of the Evidence and the affidavits submitted by the parties, and after oral argument and briefs having been filed by counsel after this matter came on for hearing and the Court having considered the evidence introduced by the parties, and the arguments of counsel, and being fully advised in the premises the Court finds:

1. That the defendant, Brotherhood of Locomotive Firemen and Enginemen has threatened to strike and intends to strike against the plaintiffs, solely because of or on account of plaintiff's refusal to accept or noncompliance with Award Number 18720, docket number 34752 entitled Louisville & Nashville Railroad Company v. Brotherhood of Locomotive Firemen and Enginemen concerning the claim of fireman B. G. Humphries, entered on May 14, 1958,

by the First Division of the National Railroad Adjustment Board, and the order thereon, and without instituting and proceeding to judgment an enforcement proceeding in the United States District Court as authorized and provided for in the Railway Labor Act Title 45 U.S.C.A. Section 151, et seq. The other defendants, Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, intend to assist said defendant, Brotherhood of Locomotive Firemen and Enginemen, in said strike and themselves to strike in sympathy with said defendant. Said strike, if it occurs, would cause immediate and irreparable injury, loss and damage to the plaintiffs in that the strike of the plaintiff's employees as threatened will shut down the operations of the plaintiff's railroad and cause cessation of the movement of freight and passengers on plaintiff's line and in interstate commerce, and will cause the plaintiff to lose a large sum daily in revenue from passengers and freight, and will cause the plaintiff to incur fixed charges in a large amount daily without any revenue. Plaintiff has no adequate remedy at law, and the amount involved exceeds Ten Thousand Dollars ($10,000) exclusive of interest and costs.

2. The Court concludes:

A. That it has jurisdiction of the subject matter and the parties to this action for the purpose of granting a permanent injunction;

B. That the permanent injunction ought to issue as prayed for in the complaint.

It is, therefore, ordered, adjudged and decreed, that the defendants, Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall as General Chairman and individually; Brotherhood of Locomotive Engineers and H. J. Roadcup as General Chairman and individually;

Order of Railway Conductors and Brakemen and L. G. Mulinix as General Chairman and individually; Brotherhood of Railroad Trainmen and J. M. King as General Chairman and individually; the members of the crafts and classes they represent, and all persons in active concert or participating with them be, and they hereby are enjoined;

(a) From carrying out the threat of strike or striking against the plaintiff, solely because or on account of the plaintiff's refusal to accept or noncompliance with the aforesaid Award Number 18720 and order of the National Railroad Adjustment Board, First Division.

(b) From, for the purpose set out in (a), in any manner impeding, obstructing, hampering or interfering with the business of the plaintiff.

(c) From, for the purpose set out in (a), preventing or attempting to prevent by any species of intimidation, threats, force or coercion, any of the plaintiff's officers, agents, employees, representatives, and others having business with the plaintiff from entering, leaving, and transacting business on its premises;

(d) From, for the purpose set out in (a), picketing the properties of the plaintiff and from interfering with ingress or egress from its premises, including delivery, unloading, and dispatching of its rolling stock and other equipment, in, on, about and between the plants and premises of its customers, or from loitering or congregating at or near any approaches thereto or upon any public street or highway leading into or from any place the employees of the plaintiff desire to enter or leave enroute from or to said premises;

(e) From, for the purposes set forth in (a), ordering, inducing, attempting to induce, condemning, participating in, assisting or permitting any strike, slowdown, stoppage of work or interruption of the operation of the plaintiff's railroad.

And it is further ordered that the Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, as General Chairman and individually; Brotherhood of Locomotive Engineers and R. J. Roadcup, as General Chairman and individually; Order of Railway Conductors and Brakemen and L. G. Mulinix as General Chairman and individually; Brotherhood of Railroad Trainmen and J. M. King as General Chairman and individually; and their appropriate officers, agents, servants and employees are directed forthwith to instruct and to take all action as may be necessary to insure that such instructions are carried out, and all plaintiff's employees represented by them continue their normal employment and in not ceasing employment for the purposes set out in (a).

It is further ordered that the defendant's motion to dissolve the temporary injunction is hereby overruled.

It is further ordered that since the Court has considered this matter on the merits and the findings of facts and conclusions of law the plaintiff's motion for judgment on the pleadings is overruled.

It is further ordered that since said temporary injunction has now been made permanent that the Louisville & Nashville Railroad Company, as principal, and the Fidelity & Deposit Company of Maryland, as surety, upon its bond filed in this action in the amount of Fifty Thousand Dollars ($50,000) dated February 12, 1959, are hereby discharged, and the premium for said bond shall be taxed as an item of cost against the defendants.

Judgment Granting Injunction

It is further ordered and adjudged that the plaintiff is awarded its costs in this action.

Issued at Louisville, Kentucky, this 18 day of January, 1961, at 9:30 o'clock A. M.

(s) Henry L. Brooks,
United States District Judge.

This is to certify that a copy of this Order was served on the defendants by delivering a copy to their counsel of record, Charles I. Dawson, Bullitt, Dawson & Tarrant, 17 Floor, Kentucky Home Life Building, Louisville, Kentucky, on January 4, 1961.

(s) John P. Sandidge,
Woodward, Hobson & Fulton,
1805 Kentucky Home Life Building,
Louisville, Kentucky.

NOTICE OF APPEAL.

The defendants, Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Firemen and Enginemen; Order of Railway Conductors and Brakemen; Brotherhood of Railroad Trainmen; H. J. Roadcup, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union; Jake Paschall, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union; L. G. Mulinix, Individually and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakemen, an unincorporated labor union; and J. M. King, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Railroad Trainmen, an unincorporated labor union, hereby give notice that they, and each of them, hereby appeal to the United States Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, from the entire judgment of this Court in favor of the Louisville and Nashville Railroad Company and against the defendants, and each of them, entered herein on January 18, 1961.

As required by FRCP 73(c), defendants tender herewith a bond in the sum of $250.00.

Brotherhood of Locomotive Engineers; H. J. Roadcup, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union;

Notice of Appeal

Brotherhood of Locomotive Firemen and Enginemen;

Jake Paschall, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union;

Order of Railway Conductors and Brakemen;

L. G. Mullinix, Individually, and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakemen, an unincorporated labor union;

Brotherhood of Railroad Trainmen;

J. M. King, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Railroad Trainmen, an unincorporated labor union;

By Chas I. Dawson,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,
Of Counsel for Defendants.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14,486

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff-Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS;

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN;

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN;

BROTHERHOOD OF RAILROAD TRAINMEN;

H. J. ROADCUP, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union;

JAKE PASCHALL, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union;

L. G. MULINIX, Individually, and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakmen, an unincorporated labor union;

J. M. KING, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Railroad Trainmen, an unincorporated labor union, - - - - - Defendants-Appellants.

EXHIBIT B TO THE COMPLAINT.

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division

With Referee Mortimer Stone

Interpretation
Award 18 720
Docket 34 752

Parties to Dispute } Louisville and Nashville Railroad Company
Brotherhood of Locomotive Firemen and Enginemen

INTERPRETATION.

The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

Facts and supporting data as to that issue were not included in the docket on which Award 18 720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an intepretation of the issue formerly decided. See Award 17 500 and "Interpretation" thereof.

National Railroad Adjustment Board,
By Order of First Division
Attest: (s) J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois,
this 17th day of December, 1958.

EXHIBIT C TO THE COMPLAINT.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Office of Director of Personnel
Louisville, Kentucky

January 23, 1959

L-306-9

Mr. J. M. MacLeod,
Executive Secretary, First Division,
National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

The following dispute is hereby submitted ex parte by the carrier as it cannot be satisfactorily disposed of on the property:

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Firemen and Enginemen:
Louisville and Nashville Railroad Company:

STATEMENT OF CLAIM:

Claim of Fireman B. G. Humphries for the wages he lost as fireman from March 31, 1956 to May 29, 1958 without deduction of wages he earned in outside employment during that period of time.

CARRIER'S STATEMENT OF FACTS:

Fireman B. G. Humphries was dismissed from carrier's service on March 31, 1956.

His claim for reinstatement with pay for time lost was appealed to this Division, which issued its Award 18720 on May 14, 1958, reading:

Exhibit C to the Complaint

"Claim sustained with pay for time lost as the rule is construed on the property."

In compliance with the Award, Fireman Humphries was notified on May 14, 1958, that he could return to work as locomotive fireman. Mr. Humphries replied that he would report later as he could not go to work as fireman at that time, and he actually returned to carrier's service on June 10, 1958.

The Award also ordered Fireman Humphries paid for time lost in accordance with Article 31(f) of the firemen's agreement as that rule is construed on the property. The rule reads:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken.
>
> "NOTE: This Section applies only where a fireman is held out of the service or taken out of the service on account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation."

In accordance with its understanding and interpretation of the rule, and as it has done in the past in other cases involving this and similar discipline rules, the carrier called on Fireman Humphries to advise what, if any, outside earnings he had while out of carrier's service for use in determining money payment due him under the rule. This Mr. Humphries has refused to do, claiming he should be paid full wages he would have earned as fireman, with no consideration being given to wages he earned in other employment while out of railroad service. The claim has been discussed with his representatives on several occasions, both by correspondence and in conference. However,

the Director of Personnel, who is the highest officer designated by the carrier to handle such matters, and the General Chairman, Brotherhood of Locomotive Firemen and Enginemen, have been unable to settle the dispute.

Correspondence exchanged on the property between the General Chairman and the Director of Personnel is attached hereto as carrier's exhibits "AA" to "DD" inclusive, from which it will be noted the carrier interprets the rule to contemplate deduction of outside earnings, if any, and the organization contends that outside earnings have never been taken into consideration in making payments under that rule.

As the carrier and organization could not agree on the money payment due Fireman Humphries under Award 18720, carrier resubmitted the matter to this division. On December 17, 1958, this Division held that the money issue was a new dispute and could not be decided by it in the guise of an interpretation of the issue formerly decided.

POSITION OF CARRIER:

Carrier has always understood and construed Article 31(f) of the firemen's agreement, quoted at page 2 hereof, and which is substantially the same as the rule has been since 1919 or before, to permit deduction of outside earnings, if any, in determining "any time lost" by an individual who is being reinstated under the provisions of that rule.

Article 31(f) applies only in cases where employes are discharged and held out of service. This is made plain by the Note. The rule thus provides that an employe who is discharged and later restored to the service account of the discipline not being sustained will be paid for "any" time lost by him resulting from the action taken.

The word "any" modifies or limits time lost. Obviously, the rule recognizes that there will be instances where a fireman is discharged and later restored to the service

account of the discipline not being sustained, who will suffer no loss of time or only a partial loss of time; otherwise, the word "any" would be superfluous and without meaning. It becomes abundantly clear, therefore, that the purpose of the rule is to make a man "whole." It is not intended that a man should gain by it which would be the effect of the rule if the interpretation sought by the firemen were correct.

Carrier's interpretation is not only supported by the wording of the rule but is in accord with the general law of the land. The courts have consistently held that an employe discharged is required to make the best use of his time and to seek other employment, and that having done so the discharging employer is entitled to have the earnings set off in mitigation of the damage or against what he was entitled to recover under the contract of employment which was breached.

In conference on the property concerning the proper interpretation to be placed on Article 31(f) of the firemen's agreement, the firemen's organization took the position that management is attempting to read something into the rule that is not there when we say the rule permits deduction of outside earnings. Then in the next breath they attempted to enlarge on the rule by saying that it prohibits any consideration being given to time earned in outside employment in determining time lost because of an improper discharge. Carrier submits there is no such prohibition in the rule. Furthermore, it is not necessary to enlarge on or change the rule in any way to arrive at the proper conclusion that the rule as written contemplates consideration being given to outside earnings, if any, in determining "any time lost" while out of L. & N. service.

The carrier's interpretation of the rule in question is in accordance with the opinion of this Board as expressed

in its Award 5862. In that Award this Division, speaking through Referee Fox, said:

> "Unquestionably if these cases were pending in a court of law, the claimants would, under proper limitations, be required to account for any money earned in other employment. This seems to be conceded by all the referees who have considered the question, and citation of authority of courts on the subject is not considered necessary. This established rule applies to every character of case when the breach of a contract involving personal service is involved. There may have been the grossest of violation, attended by circumstances justifying punitive damages, and yet, whatever the ground for the damages assessed, there must be credited, as against compensatory damages, any money received by the plaintiff from other employments during the period covered by the breach and for which damages are allowed. The reason back of this rule is not difficult to find. It rests on the proposition that if there had been no breach of the contract the plaintiff would have earned a certain sum. If by reason of the breach he is deprived of any part of that sum, he is entitled to have the same paid as damages so that he might be made whole; but if, during that period, he earns money from other sources a less sum is required to make him whole, and his damage is lessened to that extent. A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires.
>
> "We are unable to see why this legal principle should not be applied to the case before us. It may be said that we have here a plain provision of the

contract providing for payment, in a certain way, for a specified violation, and that no mention is made of any deduction. This is not different from the ordinary contract of employment. Such a contract may or may not be for a specified time, but the compensation is either fixed by the contract or an agreement to pay a reasonable wage or salary is implied by law. Rarely is anything said about a breach, because none is contemplated; and rare indeed would be the instance where the parties discuss the minutia of the methods to be employed in compensating one party in cases of a breach. When the breach occurs the law steps in and prescribes the method of compensation in damages. Here we have a contract between the carrier and the employe. Under it the carrier undertakes to protect the employe in his right to work under certain rules of seniority. The carrier violates that agreement, the employe is not permitted to work at times when he had the right to do so and he suffered damage thereby to the extent of the days lost, or the payments provided to be made. That is his claim for damage and so far he is on solid ground; but then comes the law which says to him: your right to damage is clear, but when your contract was breached by the carrier it became your obligation to secure other employment, and if you did so, and received compensation therefor, you must credit the amount received on your claim, because you are not damaged beyond the difference between what you would have received from the carrier and what you actually received from other sources during the same period. You are not entitled to receive compensation from two sources for the same day, unless the wage you actually received is less than you were entitled to receive from the carrier. We see nothing unsound in this position. Under it the carrier

is made to comply with the monetary terms of his agreement; the employe is saved from loss, and exact justice is meted out to the parties concerned. In the application of this principle liberality should be exercised in favor of the employe. He should not be held too strictly to his legal obligation to seek other employment. Practical considerations of residence and family conditions should be considered. But when an employe actually receives wages for work performed on the same dates he should have been permitted to work for the carrier, he is only entitled to the difference between the wages he should have received and those actually received. Of course, wages received, at times when his seniority did not entitle him to work for the carrier, do not enter the picture, and should not be deducted.

"The Congress in its wisdom has seen fit to relieve employes of railways doing interstate business from the burden of resorting to the courts with attendant expense and delays, for the vindication of their contract rights; has extended this principle to other lines of industry; and has set up numerous boards and commissions, of which this Division is one, to carry out its purposes in this regard. But there are many lines of industry in which it does not possess the power to act, or having the power has not chosen to exercise it. In such cases the rules of law prevail, and as we have stated earnings must be credited against damage. We think the same standard should prevail in all cases, unless some particular contract sets up a different one. We do not believe the contract under consideration does so."

The legal principle referred to by this Board has also been applied by the courts involving railroad claims. In fact, the discipline rule of the conductors' agreement on

this property, materially the same as Article 31 of the firemen's agreement, has been interpreted by the courts as permitting deduction of outside earnings. The case referred to involves the decision of the Court of Appeals in the case of *Louisville and Nashville R. Co.* v. *Wells*, decided March 3, 1942 (289 Ky. 700, 702-706). In that case, Wells, an L. & N. conductor, had collected benefits under a group insurance policy on the basis of total and permanent disability. Shortly after collecting the last monthly installment of the insurance payment Wells applied for reinstatement and to the active service of the carrier, and subsequently brought suit "for breach of contract of employment, seeking not only a recovery of wages he could have earned during the period, but also for reinstatement in the service, with seniority rights." The Opinion of the Court stated:

> "The action is for breach of contract of employment as a conductor made in plaintiff's behalf by the Benevolent Order of Railway Conductors, (sic) a Labor union to which he belonged, with the Louisville and Nashville Railroad Company * * *. The particular part of that contract upon which the plaintiff rested his case, Article 31, is as follows:"

The pertinent section of Article 31, referred to by the Court above and on which Conductor Wells based his claim for restoration to service with pay for time lost, read as follows:

> "The accused will be permitted to attend the investigation, hear all the evidence submitted and be represented by fellow employees of his own selection. Within five days after the investigation closes (the investigation is not considered as closed until the division official receives the approval of the General Manager of reports submitted), the proper officer will

render a decision, and advise the accused, in writing, the penalty imposed. If the decision is unsatisfactory, the accused, through his representative, will have the right to appeal to higher officer of the railroad. In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and *paid full wages for any time he may have lost* as a result of the charge or investigation."

(Emphasis added.)

The Court held that the railroad was not liable to the plaintiff as a matter of law, for four reasons. Omitting the first three which are not pertinent to this case, the fourth reason given by the Court was as follows:

"The plaintiff did not plead or prove that he had been unable to procure any employment during the six years and more since his alleged recovery or that he had not earned any money at all. When a contract for personal services has been wrongfully terminated by an employer, it is the duty of the employee to minimize his damages by diligently seeking to find similar employment in the locality. He cannot sit by idly. He cannot recover more than the difference between the contract wages or salary and the amount he earned or could have earned with reasonable diligence. And on this element of a right of action for damages for breach of contract of employment, the burden is on the plaintiff to allege and prove that he exercised reasonable diligence in the respect stated and his inability to earn anything, if such was the case, or what he earned during the period. John C. Lewis Company v. Scott, 95 Ky. 484, 487, 23 S. W. 192, 44 Am. St. Rep. 251; Abrams v. Jackson County Board of Education, 230 Ky. 151, 18 S. W. (2d) 1000; Torson

Construction Company v. Grant, 251 Ky. 800, 66 S. W. (2d) 79. There was neither pleading nor proof of this fact, so even had the other fatal defects not existed, he would have been entitled to recover only nominal damages. Newport Dairy v. Shackelford, 261 Ky. 754, 88 S. W. (2d) 940."

The position taken by the firemen's organization in this dispute is set out in letter addressed to the Director of Personnel by the General Chairman, under date of May 20, 1958 (carrier's exhibit "CC"), wherein it was stated:

> "Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board. In this connection your attention is directed to Awards 5248, 16245, 17030, and 17644 of the First Division, National Railroad Adjustment Board, in which earnings in outside employment were not deducted from the time lost payment, and there are many other Awards. In these cases payments were made for full time lost without any deduction for earnings in outside employment. Accordingly, we will expect Mr. Humphries to be paid for full time lost."

By correspondence and in conferences the carrier has explained to the organization that contrary to the position it is now taking, the carrier has always given consideration to outside earnings a man, who is to be reinstated with pay, may have had while out of L. & N. service. Furthermore, that no discipline rule under any agreement this carrier has with its various classes of employes, including Article 31 of the firemen's agreement, has ever been construed on the property as prohibiting deduction of outside earnings.

Exhibit C to the Complaint

The four awards referred to by the employes in the above quoted letter support the position of the carrier rather than the position of the employes as outside earnings were considered by management in each of the four cases.

Award 5248 involved Conductor J. B. Cooper, who had no outside earnings.

Award 16245 involved Conductor T. J. Holbrooks, who had no outside earnings. Furthermore, the settlement in that case included his retirement from active service.

Award 17030 involved Fireman T. Y. Alston, who had no outside earnings and so certified in his letter of June 21, 1955, addressed to the Master Mechanic, reading:

> "This is to advise that I have made no money in outside employment since my dismissal in February 1953, as I have been unemployed since that time."

This information was passed on to General Chairman Paschall, of the firemen's organization, by the Director of Personnel, in letter dated August 26, 1955, reading in part, as follows:

> "Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board, which, of course, have to be deducted from the amount due him."

This refutes the contention of the organization that outside earnings were not considered in this case, and it is significant that the General Chairman did not at time challenge the right of Management to secure such information from Fireman Alston or take the position that the rule prohibited the carrier from considering outside employ-

ment in arriving at amount that may be due an employe when ordered restored and paid for all time lost under the terms of Article 31 of the firemen's agreement.

Award 17644 involved Yardman C. C. Neal. That Award certainly refutes the contention of the employes that outside employment has never been taken into consideration in the application of Article 31 on this property, that Article being substantially the same in the four agreements this carrier has with its engineers, firemen, conductors and trainmen. In that case we made the following statement to this Board in our submission, dated December 18, 1951:

> "If, despite the gravity of the offense committed by the claimant and despite the oft-repeated declaration by the First Division that the measure of discipline is not a matter for its consideration, and its numerous declarations that it will not substitute its judgment for that of the management in discipline cases, the Division should conclude that the claim involved herein should be sustained and the claimant paid for any time lost, then this Company without waiving its position as to the merits of this claim, submits that the Division should find and award that the claimant be paid only for time actually lost by reason of the discipline imposed, that is, for the days the claimant was available and stood for work in his class or craft, less any earnings from other employment. This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period."

The Trainmen made their rebuttal to the carrier's submission in the Neal case on January 7, 1952. That rebuttal

challenged numerous statements made by the carrier, but very significantly took no exception whatever to the above statement made by us concerning the matter of deduction of outside earnings.

When Yardman Neal was restored to service in compliance with Award 17644, carrier inquired of him concerning his outside earnings. He certified that he was only employed a part of the eighty-seven days that he was out of L. & N. service. He further stated that in order to secure such part-time employment he had to move from Ravenna, Kentucky, to Cincinnati, Ohio, and then, of course, had to move back to Ravenna when restored to L. & N. service as yardman. On Mr. Neal's statement that the extra expense he was put to off-set the amount he earned, management considered he, in effect, had no outside employment and therefore paid him in full for the wages he lost while out of L. & N. service. Had Mr. Neal realized a net gain from his outside employment, management most certainly would have insisted upon deducting such earnings from the amount due him representing his lost time as a yardman.

Throughout the handling of this claim on the property, the only arguments advanced by the firemen's organization in support of its position were—

(a) Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule.

(b) The carrier is attempting to read something into the rule that it is not there when it says the rule permits deduction of outside earnings, if any.

Contrary to the first contention of the employes, carrier has always considered outside earnings when reinstating employes with pay because of wrongful discharge. Never

has a discipline rule under any agreement this carrier has with its various classes of employes, including Article 31 of the firemen's agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record of ever having done more than make any employe whole if he had other employment while out of L&N service when reinstating the employe in compliance with a Board Award or otherwise. The employes have been unable to point to a single case where consideration was not given to outside earnings. And the four cases referred to by them definitely support the position of the carrier. As hereinbefore shown, the handling given Award 17030 involving Fireman Alston, and that given Award 17644 involving Brakeman Neal, shows conclusively that consideration was given to outside earnings in determining money payments due in those two cases.

In connection with the second contention of the employes, carrier submits it is not necessary to enlarge upon or change the rule in any way to arrive at the proper conclusion that it contemplates consideration being given to outside earnings. As heretofore pointed out at pages 3 and 4, the very wording of the rule indicates that outside earnings, if any, will be deducted in determining "any time lost" by an individual who is being reinstated under the provisions of that rule. And even if this were not so, as the rules does not specifically prohibit it, under the common law rule universally applied by the courts in determining the measure of damages where an employe is wrongfully discharged, the carrier is certainly entitled to consider what, if any, earnings a fireman may have had in outside employment in determining amount due him under the agreement rule.

In this connection attention is again invited to this Board's Award 5862 wherein it was said:

Exhibit C to the Complaint

"Unquestionably if these cases were pending in a court of law, the claimants would, under proper limitations, be required to account for any money earned in other employment . . . A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires."

And to *Louisville and Nashville R. Co.* v. *Wells* (289 Ky. 700, 702-706) wherein the court held that Article 31 of the conductors' agreement on this property, materially the same as Article 31 of the firemen's agreement, permits the deduction of outside earnings in determining amount due under the rule.

Carrier submits that the claim of the employes is wholly without merit and the right of the carrier to deduct any outside earnings Fireman Humphries may have had while out of its service should be upheld.

All data in support of the carrier's position in connection with this claim have been presented to the authorized representatives of the employe. Oral hearing is not desired by the carrier, unless requested by the employes.[1]

Respectfully submitted,

(s) W. S. Scholl,
Director of Personnel.

cc: Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen
and Enginemen,
Louisville, Kentucky.

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[1]There were four Exhibits attached to L&N's Submission dated January 23, 1959. These Exhibits are the same as Exhibits A, B, C and D printed in the Appendix of Defendants-Appellants, pp. 52a-60a.

Form 3 **EXHIBIT D TO THE COMPLAINT.**

NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION

39 South La Salle Street Chicago 3, Illinois Telephone: ANdover 3-1050

In reply refer to: L-1479
1-26-59

NOTICE

To:
Mr. Jake Paschall
General Chairman, BLF&E
404-5 Hoffman Building
Fourth and Market Streets
Louisville 2, Kentucky

Time limit 2-25-59
Docket number
Oral hearing
Petitioner's file
Respondent's file

Parties: L&N v BLF&E

WITH RESPECT TO EACH SUBMISSION IDENTIFIED HEREIN:

☒ Addressee is requested, pursuant to Circular B, to file within the time limit specified above 15 copies of answer to submission filed with this Division and to give a copy to the submitting party or parties.

☐ We have received respondent's answer to your submission. Pursuant to Circular B you are requested to file 15 copies of your reply within the time limit specified above and to give a copy to respondent.

☐ Your request for an extension of time is granted to the time limit shown above for your answer or reply, as the case may be.

☐ Our docket number has been assigned and the case is complete, oral hearing waived or requested, as shown above.

J. M. MacLeod
Executive Secretary

Claim:

"Claim of Fireman B. G. Humphries for the wages he lost as fireman from March 31, 1956 to May 29, 1958 without deduction of wages he earned in outside employment during that period of time."

cc:

Mr. W. S. Scholl
Director of Personnel
Louisville & Nashville Railroad
Ninth Street and Broadway
Louisville, Kentucky

cc:
Mr. H. E. Gilbert

EXHIBIT E TO THE COMPLAINT.

B1 CTB023
CT WA041 DL PD AR FAX Washington DC 10 912AME
W S Scholl, Dir Pers
Louisville & Nashville Railroad Co Lville

Following Wire Received From Messrs Brown, Gilbert, Paddock And Kennedy "Strike Of Employees Represented By BLE, BLF&E, ORC&B and BRT on The Louisville And Nashville (Proper) Set For Twelve Noon Friday February 13, 1959 Account Refusal Of Carrier To Apply Award 18720 First Division NRAB. Please Accept This Telegram As Seventy-Two Hour Notice In Cases Of This Kind." Please Wire Statement

E C Thompson Exec Secy NMB
(31).
(842 AMC Feb 10 59)

EXHIBIT F TO THE COMPLAINT.

WESTERN UNION TELEGRAM

Louisville, Kentucky
February 10, 1959

E. C. Thompson, Executive Secretary
National Mediation Board
Washington 25, D. C.

Your wire date relative strike set for noon Friday, February 13, 1959, of employes on this property represented by BLE, BLF&E, ORC&B and BRT in connection with application of Award 18720, First Division, NRAB.

Exhibit F to the Complaint

That award ordered Fireman Humphries restored to service with pay for time lost as the rule is construed on property. Humphries is back at work. Because unable to agree with Fireman's organization on deductions for outside earnings from pay for time lost, carrier asked First Division, NRAB, for an interpretation of its Award 18720. On December 17, 1958, First Division held the dispute over deduction of outside earnings in determining amount due Humphries is new issue and could not be decided in the guise of an interpretation of Award 18720. Accordingly, on January 23, 1959, this new dispute was submitted ex parte by carrier to the First Division, NRAB, for decision. Copy of that submission covered by First Division file L-1479 being mailed you today. Since this dispute is now before NRAB for decision, threatened strike is clearly illegal under decision of U. S. Supreme Court in Chicago River and Indiana Railroad Terminal Company vs. Brotherhood of Railroad Trainmen, 353 U. S. 30.

In addition to foregoing, BLF&E is only organization-party to Award 18720 and dispute now pending before Adjustment Board and BLE, ORC&B and BRT have no legal right to strike about such award and dispute.

Respectfully submit Mediation Board should inform involved organizations that their strike threat is illegal and should be promptly withdrawn and the dispute handled to conclusion before Adjustment Board.

W. S. Scholl,
Director of Personnel.

EXHIBIT G TO THE COMPLAINT.

CTD 185

LV CT LVB192 Long DL PD Louisville Ky 10 1245PMC

W S Scholl, Director of Personnel Louisville & Nashville Railroad

908 West Broadway Lville

This Will Advise Employes Represented by BLE BLF&E ORC&B And BRT Will Withdraw From Carrier's Service At 12:00 Noon Friday February 13, 1959 In A Joint Legal Strike Approved And Authorized By The Brotherhood's Chief Executives Due To Carrier's Adamant Insistance That Outside Earnings Of Fireman Humphries Must Be Deducted From Any Money Due Him Under Award 18720

H J Roadcup Jake Paschall L G Mulinix J M King

(53)

(113 PMC Feb 10 59)

TEMPORARY RESTRAINING ORDER.

WHEREAS, in the above named case it has been made to appear by the verified Complaint filed herein, which was on the 12th day of February, 1959, presented to the United States District Court for the Western District of Kentucky, that a restraining order preliminary to hearing upon motion for a preliminary injunction should issue without notice because immediate and irreparable injury, loss, or damage will result to plaintiff, in that plaintiff is a common carrier by railroad required to furnish transportation services essential to the operation of many industrial plants employing a total of many thousands of persons; that any interruption of the services rendered by the plaintiff will seri-

ously affect the operation of said plants and the opportunity of such persons to continue to earn their livelihood; that each day that such strike occurs will result in a loss to the plaintiff of approximately $691,334.55 Dollars.

WHEREAS it appears from the verified complaint filed herein that said strike will cause great and irreparable damage to the Railroad and it appearing to the Court from said verified complaint that the plaintiff has no adequate remedy at law; and it further appearing to the Court from said verified complaint that the injury inflicted upon the plaintiff by a denial of the relief is greater than that which will be inflicted upon the defendants by the granting of the relief.

NOW, THEREFORE, upon motion of the plaintiff;

IT IS ORDERED that the defendants, Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, as General Chairman and individually, Brotherhood Locomotive Engineers and H. J. Roadcup, General Chairman and individually; Order of Railway Conductors and Brakemen and L. G. Mulinix, General Chairman and individually, Brotherhood of Railroad Trainmen and J. M. King, General Chairman and individually, the members of the crafts and class they represent, and all persons in active concert or participating with them be, and they hereby are restrained until the determination of the question of the issuance of a preliminary injunction, which hearing shall be held on Feb. 18, 1959 (Wednesday) at 10:30 AM.

1. From:

a. In any manner impeding, obstructing, hampering or interfering with the business of the plaintiff.

b. Preventing or attempting to prevent by any species of intimidation, threats, force or coercion, any of the plaintiff's officers, agents, employees, represen-

tatives, and others having business with the plaintiff, from entering, leaving, and transacting business on its premises;

c. Picketing the properties of the plaintiff and from interfering with ingress or egress from its premises, including delivery, unloading and dispatch of its rolling stock and other equipment, in, on, about and between the plants and premises of its customers, or from loitering or congregating at or near any approaches thereto or upon any public street or highway leading into or from any place the employees of the plaintiff desire to enter or leave enroute from or to said premises.

d. Ordering, inducing, attempting to induce, condoning, participating in, assisting or permitting any strike, slowdown, stoppage of work or interruption of the operation of plaintiff's railroad.

AND IT IS FURTHER ORDERED that Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, general chairman and individually, Brotherhood of Locomotive Engineers and H. J. Roadcup, General Chairman and individually, Order of Railway Conductors and Brakemen and L. G. Mulinix, General Chairman and individually, Brotherhood of Railroad Trainmen and J. M. King, General Chairman and individually, and their appropriate officers, agents, servants and employees are directed forthwith to instruct and to take all action as may be necessary to insure that such instructions are carried out, and all plaintiff's employees represented by them continue their normal employment.

2. This temporary order is upon condition that a bond be filed by plaintiff in the sum of $50,000.00 conditioned that plaintiff, L. & N. Railroad Company, shall pay to

defendants, Brotherhood of Locomotive Firemen and Enginemen and Jake Paschall, general chairman and individually, Brotherhood of Locomotive Engineers and H. J. Roadcup, General Chairman and individually, Order of Railway Conductors and Brakemen and L. G. Mulinix, General Chairman and individually, Brotherhood of Railroad Trainmen and J. M. King, General Chairman and individually, and the craft and class represented by them, such damages, not exceeding the sum of $50,000.00 as they may sustain by reason of the temporary restraining order if it shall be finally decided that plaintiff is not entitled thereto.

(s) Henry L. Brooks,
United States District Judge.

Issued at Owensboro, Ky.,
this 12 day of Feb., 1959.

ORDER.

Pursuant to Rule 65 (b), Federal Rules of Civil Procedure, by agreement of the parties, and with the consent of each of the defendants to this action, it is ordered that the Temporary Restraining Order in favor of the plaintiff against the defendants issued by this Court on February 12, 1959, shall remain in full force and effect until this action is determined by this Court on the merits. It is further ordered for the same period of time the Bond approved by this Court of February 12, 1959, of the plaintiff and Fidelity and Deposit Company of Maryland in the amount of $50,000.00 shall remain in effect.

Order

The defendants shall file their answers within 20 days from February 12, 1959, and this action is assigned for trial upon the merits on May 18, 1959, 9:30 AM.

(s) Henry L. Brooks,
United States District Judge.

Date 2/17/59

Agreed to:
John P. Sandidge,
Attorney for Plaintiff.
Robert S. Dorsey,
Attorney for Defendants.

NOTICE AND MOTION.

To: Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville 2, Kentucky, Attorneys for Defendants.

Please take ~~notice~~ that on May 8, 1959, at 2:00 P. M., C.D.S.T., the plaintiff will move the Court in the Court room listed above in accordance with the attached motion.

CERTIFICATE.

This is to certify that a copy of this motion and notice was delivered to Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville 2, Kentucky, Attorneys for Defendants, on April 30, 1959.

MOTION.

Comes the Louisville and Nashville Railroad Company, plaintiff herein, and moves the Court to enter judgment on the pleadings filed in this action in favor of the plaintiff, Louisville and Nashville Railroad Company, against the

defendants herein for the reason that the joint answer of the defendants pleads as a defense and is an admission that the strike originally called for February 13, 1959, and restrained by this Court was called in violation of the Railway Labor Act, 45 U.S.C.A. 153 (p) for the purpose of enforcing an award of the National Railroad Adjustment Board. (See Paragraph F of Answer.)

John P. Sandidge,
Woodward, Hobson & Fulton,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky,
H. G. Breetz,
Louisville and Nashville Office Building,
908 West Broadway,
Louisville, Kentucky,
Attorneys for Louisville and Nashville Railroad Company.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY,
AT LOUISVILLE.

CIVIL ACTION No. 3749.

TRANSCRIPT OF EXCERPT FROM THE PROCEEDINGS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - PLAINTIFF,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., - - - - - DEFENDANTS.

BEFORE HONORABLE HENRY L. BROOKS, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY, LOUISVILLE, KENTUCKY, ON MONDAY, MAY 18, 1959, WITHOUT A JURY.

APPEARANCES:

FOR THE PLAINTIFF

Mr. John P. Sandidge
Mr. H. G. Breetz
Mr. Claude Temple
Louisville, Kentucky

FOR THE DEFENDANTS

Mr. Charles I. Dawson
Mr. Brooks Senn
Louisville, Kentucky
Mr. Russell Day
Mr. Wyland Sullivan
Mr. John Ritter
Cleveland, Ohio

Excerpt from the Proceeding

THE FOLLOWING EXCERPT FROM THE PROCEEDINGS IS TAKEN FROM THAT PORTION OF THE PROCEEDINGS IMMEDIATELY PRECEDING THE INTRODUCTION OF PROOF:

By the Court: How many witnesses do we have, gentlemen?

Mr. Sandidge: May it please the Court, under the pleadings—I can ask the Judge (Dawson) to stipulate—we have the issue of irreparable injury still involved in this case, and as the pleadings now stands it will be necessary for the railroad to prove irreparable injury. If the Judge will waive that in open court—

By the Court: How many witnesses do you have on that matter?

Mr. Sandidge: Well, we've got—

Mr. Dawson (Interrupting): Well, we're not going to require them to prove—

By the Court (Interrupting): I wouldn't think so.

Mr. Dawson (Continuing): —that irreparable injury would result if their line is shut down by a strike. I'm not agreeing to the astronomical figures they use, and I don't think it's necessary—

Mr. Sandidge (Interrupting): What he has reference to, Judge,—

By the Court (Interrupting): Is the six hundred some-odd—

Mr. Sandidge (Interrupting): We can prove it and stand ready to prove it, and unless the Judge is willing to agree we will prove it.

Mr. Dawson: As a stockholder, Judge, I'd like to know where all the money is coming from?

Mr. Sandidge: Too much labor, Boss.

By the Court: The irreparable injury which they would have lost is stipulated?

Mr. Dawson: We'll stipulate that it's not necessary to prove that irreparable injury.

* * * * * * *

TRANSCRIPT OF TESTIMONY.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY,
AT LOUISVILLE.

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Louisville, Kentucky

Mr. Russell Day
Mr. Wyland Sullivan
Mr. John Ritter
Cleveland, Ohio

* * * * * * *

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TRANSCRIPT OF TESTIMONY.

J. B. CLARK, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION BY MR. JOHN P. SANDIDGE.

Mr. Sandidge: May it please the Court, before we proceed, under the rules concerning the introduction of official records I would like to introduce over the certificate of the Secretary of the Board a copy of the award made on May 14, 1958, as Exhibit 1, Plaintiff's Exhibit 1;[1] the copy of the interpretation made December 17, 1958, as Exhibit 2;[2] the submission of January 23, 1959, of the railroad, as Exhibit 3;[3] notification from the Board to the railroad and Mr. Paschall of the filing of the submission dated 1-26-59 as Exhibit 4; and the exhibit—a notification of the extension of time for filing response by the union as Exhibit 5, Plaintiff's Exhibit 5.

(Whereupon, Documents Above Referred to Were Received and Marked by the Reporter as Plaintiff's Exhibits Nos. 1 Through 5, Inclusive.)

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Mr. Sandidge: Mr. Clark, will you state your name and address, please, and your present capacity with the railroad?

Mr. Clark: J. B. Clark, 318 Ring Road. I'm now Chief Engineer with the railroad.

Q. Back in 1957, Mr. Clark, what was your capacity with the railroad?

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[1]Plaintiff's Exhibit No. 1 at the Oral Hearing is the same as the Exhibit printed in Appendix of Defendants-Appellants, pp. 17a-19a.

[2]Plaintiff's Exhibit No. 2 at the Oral Hearing is the same as the Exhibit printed in Appendix of Defendants-Appellants, p. 68a.

[3]Plaintiff's Exhibit No. 3 at the Oral Hearing is the same as the Exhibit printed in Appendix of Plaintiff-Appellee, pp. 3b-17b, *supra*.

Testimony of J. B. Clark

A. I was Assistant Director of Personnel.

Q. And as Assistant Director of Personnel what was your function concerning disputes as to the contract?

A. I would meet with the representatives of the organizations and discuss or negotiate different issues in regard to the contracts and particular—particularly with reference to discipline I handled with others in the department all of the meetings in which discipline was discussed.

Q. Did you handle the discussion with—between the railroad and for the railroad on behalf of the railroad with the Fireman concerning Fireman P. J. Humphries?

A. Yes, I did. It's "B. G." though, isn't it?

Q. B. G.?

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A. Yes.

Q. Excuse me. Now, when did this dispute first arise as far as you were concerned concerning Fireman Humphries?

A. I don't remember the very first meeting, but I do know that by June, 1957, we were in meetings with the organizations; that is, with the Firemen's organization, and we discussed this case along with several others. I know that it was at issue before that time and before February 22, 1957.

* * * * * * *

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Q. What is the first conference that you have a note of concerning Fireman Humphries?

A. That's on June 7th, 1957.

Q. All right. What occurred at that conference?

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A. (Referring to Notes) At that time all of the cases that were at issue were discussed, including the Humphries case. There was no decision reached at that meeting.

Q. What was the nature of the discussion concerning the Humphries case? Was it concerning the merits or demerits of his discharge?

A. The organization was asking that we put Mr. Humphries and other people that they contended had been dismissed unjustly back to work.

Q. All right. Now, what was the next conference you had?

A. Well, on June the 10th we continued the discussions and again that covered the whole docket of cases with no special emphasis on the Humphries case.

Q. Were the demands still that he be put back to work?

A. Yes, sir.

Q. All right, sir. Were there any—had the mediator come on the property yet?

A. Yes, sir, he was present at both those meetings.

Q. All right, sir. Do you have a note when

he first came on the property?

A. No, I don't, not in these notes. But I do know he was there on the 7th.

Q. All right. Now, I want you to tell me if you can recollect at those two conferences was there any discussion about the method of calculating back pay?

A. No, not at that time.

Q. All right. Now, what is the next conference you have?

A. The next conference with the organization was on June the 7th, 1957, and that was after a submission had been submitted to the Railroad Adjustment Board.

Q. Now, are you sure about that last statement? Wasn't the first submission on June 13, 1957?

A. That's right.

Q. All right. Now, when did you say the next conference was?

A. June 19th.

Q. June 19th. All right. Now, at that time the matter was before the Board?

A. That's right.

Q. Now, what was the nature of the conference you had on June 19th?

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A. Mr. Mitchell, who was—

Mr. Dawson (Interrupting): Is that '37?

Q. Yes, sir.

A. Mr. Mitchell went over the docket—

Q. (Interrupting) Who is Mr. Mitchell?

A. He's the vice-president of the Brotherhood of Locomotive Firemen and Enginemen.

Q. All right.

A. Went over the docket and said that he didn't particularly like our sending any of the cases to the Board, but agreed that we might have the right to send the discipline cases to the Board. He thought that the other cases did not belong there.

Q. All right. Now, after the case was submitted, when did you have your next dis. ssion? Was it after the award?

A. It was—the next one I have a note on, at any rate, was in—on July 17, 1958, and that was after the award on the question of whether or not Mr. Humphries should be restored to service.

Q. Now, who were you dealing with on behalf of the Firemen's union?

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A. At that meeting the Firemen were represented by Mr. Mitchell, the vice-president, and Mr. Paschall, the General Chairman on the L & N System.

Q. All right. Were there any other people at that meeting, any other representatives of any other unions?

A. No, sir.

Q. Now, were you there alone by yourself for the railroad or was there anyone else?

A. Mr. Wallace was with me, Mr. W. T. Wallace.

Q. Now, what was the nature of the discussion at that time concerning Fireman Humphries?

A. The question of the right to deduct outside earnings had been raised by correspondence between the time of the award and the meeting on the 17th. Before this meeting we had written Mr. Humphries, the Division Superintendent had written Mr. Humphries, and asked for a statement concerning his outside earnings in order that we might prepare a voucher for what—for his pay for time lost, less the deduction of Railroad Retirement, Unemployment Benefits, if any that he might have, Income Tax and outside earnings.

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Q. Now, at that time what was the upshot of the conference you had with Mr. Mitchell and the others?

A. They contended—that is, Mr. Mitchell and Mr. Paschall, that we had no right to deduct outside earnings from the gross amount that Mr. Humphries would have made if he had worked during, for the railroad, during the time that he was out of service.

Q. Now, had this issue come up before?

A. In this case?

Q. Yes.

A. Do you mean—it had come up before in correspondence. That was between the time that the award was issued and the time that the conference was held on July 17th.

Q. Did it come up prior to the award?

A. Well, I don't believe that we mentioned the—what the payment would be, because until we got the award we didn't even know whether Mr. Humphries would be reinstated and if he was reinstated we didn't know whether he would be reinstated with or without pay, so they—it was not a matter of discussion until after the award.

Q. All right. Now, after the conference, or during the conference, was there any threat concerning

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strike, one way or the other?

A. On the 17th—I don't recall definitely that there was; that is, I don't have any note on it. I can't say for sure that there was a threat of strike at that time.

Q. All right. Now, do you know when the request was made for an interpretation by the railroad—

A. (Interrupting) Yes.

Q. (Continuing) —to the Board, of the award?

A. Yes. There was a request made on September 23, 1958, for an interpretation of the original award since there was a question as to the meaning of that award.

Q. All right. Now, did you prepare that submission?

A. I didn't prepare it myself, no, sir.

Q. All right.

Mr. Dawson: Do what?

Q. Did he prepare the submission. And he said he didn't.

Now, after this particular conference in May were there any more conferences concerning this matter?

A. That last conference was in July 17th.

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Q. July?

A. And then there was a conference on July 30th.

Q. All right.

A. Prior to the time that we submitted the matter to the Adjustment Board for an interpretation on July 30,

1958, there was a conference held at which time the Firemen were represented and also the Brotherhood of Locomotive Engineers, the Brotherhood of Railroad Conductors and Brakemen and the Brotherhood of Railroad Trainmen.

Q. Now, what was the occasion for their being there? Did you request them?

A. No, sir, I didn't request them. They wanted to come in and join with the Firemen in the handling of this fireman's suit.

Q. • • •

At that time did you have any case pending with the other unions concerning this matter of outside wages and an award?

A. No, sir, I don't believe that we did.

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At any rate this meeting was devoted entirely to discussing the Humphries case and the issue involved and outside earnings in his case. There were other cases mentioned, but they were past cases rather than cases that were pending then.

Q. All right. Now, did you have any—any other conferences with them?

A. I don't have a note of any more conferences until after the case was submitted on September 23, 1958, when we asked for an interpretation of the original award.

Q. Did you have a conference on that day?

A. No, sir, we didn't have one on it.

• • • • • • • •

Q. All right. Now, the interpretation came down on December 17, 1958. Did you have any conference after that?

A. Yes, sir. On January 23, 1959, there was a conference with the same organizations represented that were represented on the—in the conference of July 30, 1958.

Testimony of J. B. Clark

Q. And what was the upshot of that conference?

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A. Mr. Mitchell asked that we pay Mr. Humpries' gross earnings without any deductions for outside earnings and said at the time that a strike date would be set if we didn't agree to it.

I suggested that the matter could be handled in an orderly procedure through the Railroad Adjustment Board, and the organizations intimated that they didn't think that that was the way they wanted to handle it. Mr. Hoskins, who was there for the Brotherhood of Locomotive Engineers—he's the Assistant Grand Chief, I believe, of that organization—asked that we give him a letter stating our position, and all the other people that were there also asked that a letter be given to them.

We wrote them on the 23rd and gave them—

Mr. Dawson (Interrupting): 23rd of what?

A. (Continuing) —and gave—

Q. (Interrupting) The date, 23rd—

A. January 23, 1959, and told them that we were attaching a copy of our submission that outlined in full our position and that was of course that this—the Board had ruled that this was a new dispute and we were submitting it as such to the Board for their decision.

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Q. Now, Mr. Clark, who made the decisions to submit the first submission of June the 3rd, 1957, to the Board?

A. The railroad company made that decision.

Q. And who in particular in the railroad?

A. Well, I would say the Personnel Department. I at least concurred in that decision. I thought that that was the thing to do—

Q. (Interrupting) All right.

A. (Continuing) —to send it to the Board.

Q. Now, do you mean by that Mr. Scholl?

A. Yes, he also agreed.

Q. All right. Now, as to whether cases are submitted or not, as far as the railroad is concerned, is Mr. Scholl, the Director of Personnel, the man who determines those questions?

A. In the case where we instigate, we make the first submission, I would say yes. He finally is the one who decides whether it should be submitted.

Q. All right. Now, after the submission was—the submission of June 13, '57, was made, who decided to make the submission of September the 23rd, '58, for an interpretation?

A. That was arrived at in the same manner. Mr. Scholl finally was the one who agreed that it should be submitted to the Board.

Q. All right. Now, as to the submission of January 23, '57, who made that decision for the railroad?

A. Do you mean '59?

Q. '59, excuse me.

A. That was decided in the same manner.

Q. All right. Now—before the first submission, June 3, '57, was there any strike threat?

A. Yes, sir, there was.

Q. Can you tell the Court the nature of that threat?

A. I don't recall the exact wording of the threat as written to us, however the letter that I mentioned before written by the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen outlined the entire docket and his position in the cases, and the last part of that, if you would like for me to read it—

Q. All right.

A. Says, "It's imperative that this circular be given top priority for which approval of the strike is given. The strike will be called on short notice. Further

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strike instructions will be issued as soon as they are cleared by our International president."

Q. All right. Now, when did you receive the next strike threat?

A. I don't have a record of a letter, if any, that we received on it, but we did see a copy of a notice sent to the Brotherhood of Locomotive Engineers by their General Chairman saying—where they issued a strike ballot asking the men to decide whether or not they wanted to strike.

Q. What was the approximate date of that?

A. I believe it was August 4th.

Q. What year?

A. 1958.

Q. All right. (To Mr. Dawson) Your witness.

A. May I add something, to answer a question that I didn't have the answer to while ago?

You asked about when the mediator came on the property?

Q. Yes.

A. I have a note here that he called us on May the 29th, 1957. We had a meeting with him on June the

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3rd, 1957, and then I mentioned before the meeting of June the 17th.

Mr. Dawson: Did you say you were through, Mr. Sandidge?

Q. Just one or two more questions, Judge (Mr. Dawson). I'll ask you to examine the Plaintiff's Exhibit No. 3, which is the Submission of January 23, 1959. Now, have you seen that before?

A. Yes, sir.

Q. Was that prepared pursuant to your direction?

A. Yes. We went—I told you while ago how we decided to prepare the submissions, and it was under my

jurisdiction, as well as under Mr. Scholl's jurisdiction, that that was prepared.

Q. All right. Now, why was that submitted, the submission of January 23, 1959?

A. Because on the meeting of that day the vice-president of the Firemen, Mr. Mitchell, stated that—not in these words, but with this meaning—that unless we agreed to pay Mr. Humphries the gross earnings without any deduction for outside pay, outside earnings, that a strike date would be set. And we felt that the orderly

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procedure would be for the case to be submitted to the Adjustment Board for their decision, and since the Firemen indicated that they were not willing to have it handled that way the only alternative was for us to get it before the Board.

* * * * * * * *

Cross-examination by Mr. Charles I. Dawson.

Mr. Dawson: Mr. Clark—

Mr. Clark: Yes, sir.

* * * * * * * *

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Q. * * * Now, what was your job when Humphries was discharged?

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A. I was Assistant Director of Personnel at the L & N.

Q. And who handled the grievance for the railroad when that discharge took place? Who handled the grievance of Humphries?

A. For the railroad?

Q. Yeah.

A. I did.

Q. You handled it?

A. Yes, sir.

Q. Who represented the Fireman in that meeting?

A. Well, there were several meetings, and I can say that Mr. Paschall, as General Chairman, and Mr. Mitchell, as vice-president, of the organization were present at one or—one or both of them were present at all of the meetings.

Q. Now, at the time that this grievance was filed, as it was being processed, under the contract, representing Mitchell—I mean, Humphries, the only union officials who were there was the heads of the Brotherhood of Locomotive Firemen and Enginemen, is that right, and Mr. Mitchell, who was also an officer of that brotherhood?

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A. I believe that—that at that time they were the only ones. • • •

• • • • • • • •

Q. Now then, what I'm asking you—

A. (Interrupting) Well, all right.

Q. (Continuing) —is that the original

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processing of the grievance of Humphries, arising out of a discharge, none of the brotherhoods were represented in the conference with the railroad except the Brotherhood of Locomotive Firemen and Enginemen, is that right?

A. During the early part of '57, as I said before, there was a joint—there were several joint conferences attended by the two organizations, Trainmen and the Firemen.

Q. That doesn't answer my question. I asked you, in processing this case of Humphries was any of the brotherhoods represented there except the brotherhood to which Humphries belonged, Firemen?

A. Can we say at the time it was submitted and eliminate that—

Q. (Interrupting) What do you mean, at the time submitted?

A. The time that we submitted the—

Q. (Interrupting) Well, up to the time that it was submitted to the Railroad Adjustment Board, no one had appeared in the conference with the railroad in behalf of Humphries except the representatives of his own brotherhood, is that right?

A. I'll say for him, personally, no. There

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was—

Q. (Interrupting) All right.

A. (Continuing) —this joint conference with the Trainmen when the—

Q. (Interrupting) None—

A. (Continuing) —when the two lists of cases were handled at the same time.

Q. At the time those conferences was going on there wasn't any discussion, you say, of deduction of outside earnings, is that right?

A. That's right.

Q. There was no occasion at that time to discuss that issue, particularly, was there?

A. That's right. There was no occasion.

Q. You were taking the position then that he was rightfully discharged and there wasn't going to be any occasion for applying your contention about deduction of wages—outside earnings, is that right?

A. That's correct.

Q. In the course of that conference did the railroad—did the Brotherhood representatives, that is, the representatives of the Firemen, make any statement

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about a strike if you couldn't get that claim adjusted?

A. Now, which meeting are you talking about, sir?

Q. Any of the meetings up before you made your first submission to the Board.

A. Yes, I'm sure that it was mentioned, but I can't tell you exactly what date it was mentioned, but I'm sure that it was, and as I stated before—

Q. (Interrupting) But it was mentioned before the submission.

A. That's right.

Q. Now then, to avoid a submission—to avoid a strike the railroad submitted, did what they call, making a submission of the controversy to the Adjustment Board, is that right?

A. That's right, sir. We submitted the Humphries case along with some three or four more cases involving some Firemen—

Q. (Interrupting) And if you hadn't anticipated a strike the railroad wouldn't have submitted it, would it? It would have left Humphries take the submission.

A. That's right.

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Q. So that first submission was not so much to get the merits of the controversy disposed of but to head off a strike, is that right?

Mr. Sandidge: I object to the question. It calls for a conclusion, Judge.

By the Court: It does call for a conclusion, but we'll let him answer.

Q. He said that anyway, practically.

Well, now, at the time this submission was made by the railroad, for whatever purpose, which I think is perfectly apparent—

Mr. Sandidge (Interrupting): Judge (Dawson) are you going to testify?

Q. Yes, I reckon.

(General laughter in the Courtroom.)

Q. Did the railroad at that time have fixed in its method of administering and settling awards that it was

going to claim deductions from any award that might be made by the Adjustment Board to cover the earnings of the aggrieved employee during the time he was laid off, held out of service?

A. I lost the first part of the question. Would you just—

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Q. (Interrupting) Did you have in your mind, you and those people who were administering the affairs of the railroad in this particular branch, that if the Adjustment Board should order this man reinstated with pay for lost time that you would claim deduction from pay for lost time on account of earnings that Humphries may have made on the outside while he was held out of his job?

Mr. Sandidge: I object to the question on the ground that the submission is going to speak for itself, Judge.

Q. I'm not talking about the submission. I'm talking about—

By the Court: Well, I think he's asking about the policy of the railroad, or whether there had been discussions regarding it. I think it's proper, and Mr. Clark can answer.

A. All right, sir. We had not decided what the next move would be until we got the decision. In the last case, with the Firemen, before this, when we got a decision saying that the man should be reinstated, with pay, we wrote the man and asked him for his outside earnings, and that was considered.

Q. Well, now, let's see a minute. Please

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listen to this question.

A. All right, sir.

Q. At the time that case was submitted, I mean the Humphries case, to the Adjustment Board, was it then the intention, as well as, I said, the policy of the railroad in

the event an award should be made to deduct from the amount of the award whatever Humphries had earned on the outside?

A. As I said, we did not decide what would happen next until we got the decision from the Board.

Q. Well, surely you knew what the attitude of the railroad company was about deducting outside earnings, didn't you?

A. Yes, because we had handled cases with the Firemen before.

Q. And you had been claiming in—through all these proceedings, and others representing the railroad, that the consistent policy of the railroad has been to deduct outside earnings from any award such as that of Humphries?

A. It's been the policy to consider outside earnings.

Q. Well, what was you considering them for

unless you intended to deduct them?

A. We intended to deduct them if they—

Q. (Interrupting) All right. Now, that was the policy at the time you took this case by submission to the Adjustment Board the first time, is that right?

A. That's right.

Q. Now, in your submission to the Board did you make any claim whatever that you would be entitled to deduct from any award for time lost which the Board might give to Humphries the amount that Humphries may have earned on the outside?

A. No, we did not.

Q. You did not. Yet you knew that that question was going to arise if Humphries was ordered restored and if the Board ordered that he be paid for time lost, according to the rules as interpreted on the property?

A. No, sir, we did not know the question would be raised.

Q. Well, why didn't you know it?

A. Because in the previous case—in the first place, to know that we would have to know what the organization was going to do, and of course we can't

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always know that. We can't—

Q. (Interrupting) I'm not talking about what—

Mr. Sandidge (Interrupting): Let him answer the question finally, Judge (Dawson).

Q. John (Sandidge) says you know a lot more. Go ahead and testify.

A. In the most recent case prior to this we did consider outside earnings and mentioned it to the General Chairman, and no issue was taken about our considering the outside earnings. So we had no way of knowing that they would consider it this time or—

Q. (Interrupting) Do you mean—

A. (Continuing)—or rather that they would take issue with our considering it.

Q. Do you mean to intimate that in some previous case you took the position that the railroad was entitled to deduct outside earnings—

A. (Interrupting) Yes, sir.

Q. Wait a minute. (Continuing)—and that that position was taken with the Brotherhood to which the aggrieved employee belonged and that the Brotherhood raised no question about it?

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A. That—

Q. (Interrupting) Do you mean that?

A. Let me tell you just what happened, and—

Q. (Interrupting) Well, I wish you would.

A. All right, sir. In the most recent case with the Firemen, and that was the T. Y. Alston case, when he was

ordered to be restored to service and paid for time lost, we wrote Mr. Alston a letter—

Q. (Interrupting) Who is Mr. Alston?

A. T. Y. Alston (Speiling) A-l-s-t-o-n. He was a Fireman workin; under the L & N contract.

Q. Well, he was the aggrieved employee, wasn't he?

A. That's correct. And we asked for a statement of his outside earnings. Mr. Alston replied that he had no outside earnings. We wrote Mr. Paschall and we said, "We're ready to talk about the Alston case and decide, determine the amount of money due him," and I'm paraphrasing what we wrote him. I don't have the letter. But the thing that is pertinent, we said that, "We have asked Mr. Alston if he had any outside earnings and he said, none, and—

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Q. (Interrupting) Where is that stated?

A. I beg your pardon?

Q. Where did you say that, in a letter or in a conference?

A. In a letter.

Q. Well, what did Paschall say?

A. He said nothing about that.

* * * * * * * *

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Q. Now then, after the Board had acted on this first submission and made the award, a copy of which I think has already been introduced, did the Brotherhood of Locomotive Firemen and Enginemen, through its representatives, take the matter up with the company then about payment of the award?

A. Now, are you speaking between the time of the original award and the time we asked for an interpretation?

Q. That's right.

A. Yes, sir, they did.

Q. And the railroad company was insisting then that it wouldn't pay this award unless it were permitted

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or unless it was agreed to that there might be deducted therefrom whatever earnings that Mr. Humphries had made on the outside while he was held out of his job. That was your attitude, wasn't it?

A. We were—we contended that the award did not require us to pay him the full gross earnings, but that we could under the award deduct any outside earnings that he had.

Q. Now then, the award didn't say anything about deducting outside earnings, did it?

A. No, sir. It said, "as the rule is construed on the property," I believe is the wording of it.

Q. And you were taking the position that the rule as construed on the property justified your company in taking this outside earnings from the amount otherwise payable, is that right?

A. That's right.

* * * * * * *

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Q. Well, now, in that opinion, that order spoke about the rule, it was talking about the contract, wasn't it?

A. Yes, sir.

Q. And in railroad parlance this contract is spoken of as a rule?

A. The different items agreed to are spoken of as rules, that's right. Rule 31 is the disciplinary rule.

Q. I show you here the agreement between the Louisville & Nashville Railroad and the Locomotive Firemen, and so forth, and I call your attention to 31, Rule 31 of which reads this way, so far as material here,

"If the discipline administered—and by discipline they mean the discharge or the lay-off of an employee, don't they? What do you mean by discipline that you—

Mr. Sandidge (Interrupting) May it please the Court, I think the contract speaks for

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itself, Your Honor.

Q. It don't tell what discipline means.

Mr. Sandidge: This is a negotiated contract. What it says is simply there, and if the Judge (Dawson) wants to introduce it in evidence, why, that's perfectly all right. That's what—

Q. (Interrupting) It still doesn't have a definition of discipline.

By the Court: Well, I think I understand what discipline means.

Q. Well, "If the discipline administered is not sustained, it will be canceled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken."

Now, that's the rule they're talking about,—

A. (Interrupting) That's right.

Q. (Continuing)—isn't it?

A. Yes, sir.

Q. And it's construed on the property. Did you interpret that to mean as it might have been agreed between the Firemen's representatives and the railroad?

A. Well, certainly if there had been a definite agreement on it, I suppose that would be the way

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you would consider it. It's the way that the rule is handled on the property that—

Q. (Interrupting) Well, you don't contend that in the absence of a long, continued application of the rule by the

railroad without a protest on the part of the union that that could be a construction of this rule that would require the deduction of outside earnings, do you?

A. I didn't quite get your question, sir.

Q. Well, you say only that there had been this agreement between the railroad and the union, the Firemen's union, the Firemen, to the effect that in such settlements the railroad might deduct outside pay. You admit that, don't you?

A. I don't know of any agreement like that.

Q. You don't know of any?

A. No.

Q. Well, you don't claim there was any, do you?

A. No, sir.

Q. Now then, do you claim that this rule had been applied so long by the railroad through the deduction of outside pay with the knowledge of the union that the union

must have been deemed to have accepted that application? Do you make any such claim as that?

A. I don't make any claim that we have actually deducted outside earnings. But I don't know of any case where a man had any outside earnings that were not deducted.

Q. Well, we'll come to that now directly.

A. All right.

Q. But you do tell us now that you don't know a single instance in all of the time that you've been connected with the railroad where outside earnings have been—have been deducted from an award for pay for lost time, do you?

A. Are you talking about under the Firemen's contract?

Q. Yes, sir.

A. I don't know of any place where it was actually

deducted. I mentioned one case where it was considered.

Q. Now then, when this Board—this case came back from the Adjustment Board with an award reading as we have stated it did—John (Sandidge), did you put that award in?

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Mr. Sandidge: Which one, Judge (Dawson)?

Q. The first one.

Mr. Sandidge: Yes, sir.

Q. And you commenced to have conferences in which the union or the brotherhoods was demanding that you comply with them. What was the position of the railroad then?

A. The position of the railroad at that time was that we had complied with the part of the award that was clear. We had put the man back to work, and we were trying to agree upon the basis for back pay; that is, pay for time lost.

Q. You was trying to make a construction then, not—and make a settlement according to the construction you was then trying to get and not in accordance with the construction of the rules as had theretofore been established, is that right?

A. We were trying to settle this case in the way we had construed the rule in the past.

Mr. Sandidge: Will you speak up a little louder, Mr. Clark.

A. I said we were trying to apply the award in the manner in which we had construed the rule in the past.

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That is, we were trying to arrive at how much he was entitled to in the maner in which we had construed the rule in the past.

* * * * * * *

Testimony of J. B. Clark

Q. Now then, when did you hold your first conferences with the Brotherhoods following the handing down of the award?

A. I believe that it was on July 17th, 1958.

* * * * * * *

Q. * * *

In this conference was any Brotherhoods represented except the Enginemen—I mean, the Firemen, except the Firemen?

A. No, sir. Mr. Mitchell and Mr. Paschall were there for the Firemen, and that's all.

Q. In that conference did you state that it was going to be the position of the railroad that in

satisfying all workmen you were going to deduct from the award—that you were going to deduct what would otherwise be due the employee under this award any sum that he may have earned on the outside during the layoff?

A. I don't remember a statement just like that.

Q. Do you say that did not happen?

A. I can't say for sure that it did not happen.

Q. On the next meeting, who was present in behalf of the Brotherhoods, any except the representatives of the Firemen?

A. Yes, sir, there were (Counting) one, two, three, four five—there were twelve people present, and, as I said before, they represented the other three operating crafts on the L & N, the Conductors and Engineers.

Q. They represented the other three brotherhoods?

A. That's right.

Q. And on that occasion did you state that it would be the policy of the company and its contention that it had the right to deduct from all monetary awards any sum that the individual involved may have earned on the

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outside during the time he was disassociated from his railroad job?

A. I don't remember anything exactly like that.

Q. Do you say you didn't say that?

A. No, sir, I did not say I didn't say that.

Q. It was certainly your intention at that time, though, wasn't it?

A. The position of the railroad was very well covered by a letter that was passed between us, I believe, between the conference of the 17th and the one of the 30th of July of '58.

Q. Now, in this letter you took the position, did you not, that the rule had never been construed on the property as prohibiting the deductions of outside earnings and that therefore you propose to deduct them, is that right?

A. I believe that letter said that there was—that the rule had never been construed to prohibit the deduction of outside earnings, that's correct.

Q. Well, now, did you mean by that to infer that therefore you had the right to deduct?

A. Well, that was our position and—

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Q. (Interrupting) That was your position?

A. (Continuing) —that was the reason for the question, and the Brotherhood took the opposite position.

Q. And that was made known to the officials of all the brotherhoods, is that right?

A. I believe a copy of that letter was sent to all of the brotherhoods. I believe that letter was also made a part of the submission asking for an interpretation.

Q. I show you here a letter on the letterhead of the Louisville & Nashville Railroad Company and dated June 26, 1958, and this particular one is adressed to "Mr. John

Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen," and it's got some notations on it that's not material. Look at that and see if you know anything about that letter.

(Witness examines document.)

A. Yes, sir, I've seen this letter.

Q. Was a similar letter sent to all of the other brotherhoods?

A. May I see it again and see if it indicates a copy? This letter doesn't show whether a copy was sent to them or not, and I'm not sure whether—we sent it. I'm sure that they got a copy of it.

Q. But at any rate, at the time this letter was sent on June 26, 1958, the Brotherhood, according to your statement, knew that it was the contention of the railroad that in all settlements of awards the award for pay for time lost should be reduced by the amount of outside earnings of the person involved, is that right?

A. I won't go so far as to say that. There are several ways an award can be given. Some of them say, "With deductions," some say, "With pay for time lost," some say, "Without pay for time lost." And we're talking now about one of those cases that the decision was not one that was clearcut. This one says, "As the rule is construed on the property."

Q. Have you ever gotten a ruling from the Adjustment Board authorizing a deduction of back pay—I mean, of outside earnings?

A. I can't quote one, but I believe that I have seen some.

Q. Well, I'd be very much interested to see one of them.

Now then, in the course of the negotiations between you and the other Brotherhoods, and I mean your department, you were in the Personnel Department out there,

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weren't you?

A. That's correct.

Q. In which they—the Brotherhood officers were trying to get the company to go ahead and settle this claim without any deduction of outside earnings, was there any statement made by the Brotherhood that if it wasn't paid that they was going to be a general strike called?

A. I can't recall the statement being made in exactly those words, but the impression that we got was that there would be. And as I mentioned before we did see a copy of a letter circulating the strike ballot.

Q. How long after the award was handed down on your first submission did these negotiations between your department and the Brotherhoods continue before you took another submission to the high—to the department—to the Adjustment Board?

A. The original award on the merits of the case, I'll say, was made on May the 14th. We had conferences on July 17th, July 30th, we couldn't agree on the meaning of the award on September 23, 1958, and a submission was sent in. That's some—

Q. (Interrupting) Now, at that time, on September the 3rd—

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A. (Interrupting) 23rd.

Q. September 23rd, 1958, you knew that if this award wasn't paid without any deduction you were faced with a probable strike by the Brotherhoods, didn't you?

A. If the award were what?

Q. If the award was not paid without the deduction of outside earnings that the railroad was threatened with the probable strike of all the Brotherhoods, is that right?

A. Yes, I think I did.

Q. You knew that?

A. Yes.

Q. And therefore on September 23, 1958, you filed another so-called submission to the Board, didn't you?

A. We asked for an interpretation of the original submission.

Q. And the Board said what?

A. They said in effect that it was a new issue.

Q. Now, where did they say in effect that it was a new issue?

A. You have a copy of it.

Q. I have it.

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Mr. Sandidge: If it please the Court, I believe the interpretation speaks for itself.

Q. Here it is right here. I want him to show me there where it says that that was a new issue.

A. They say, "We may not now"—(To the Court) Am I supposed to answer that, Judge?

By the Court: Yes. I think it speaks for itself, but you can read it.

A. "We may not now determine a new issue in the guise of an interpretation of the issue formerly decided."

Q. So, instead of getting an interpretation did you understand that the Board said to you, "You didn't raise this question on the original submission, and you can't get it now under the guise of an interpretation," is that right?

Mr. Sandidge: I object to the question, Judge. The Board's interpretation speaks for itself.

By the Court: Well, I do think the order of the Board speaks for itself.

Q. Well, I guess that's right, but I'm surprised that Mr. Sandidge objects to giving that interpretation, because I know what it's going to be and so does

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he. Now then, when you were turned down on that flight to the city of refuge, then what happened?

Mr. Sandidge: What flight, Judge (Dawson)?

Q. This so-called—

Mr. Sandidge (Interrupting): I object to the counsel badgering the witness, Your Honor.

Q. This so-called submission.

By the Court: Well, we won't ask the questions in this form. Judge Dawson knows—

Q. (Interrupting) Well, he objects to it being a flight to the city of refuge. I'll ask it this way then.

What you were—when you were unable to get the Board to hold the case up there and after the rejection of that so-called submission came down, what happened then? Did you have some more conferences?

A. (Examines notes) After we asked the Board for a—their interpretation and they said that this is a new issue and did not interpret the original award, we held a meeting at the request of the organization on January 23, 1959. Would this answer the question that you asked?

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Q. I'm sorry, I didn't hear it. But I won't ask you any more, though. I assume that you answered it satisfactorily for Mr. Sandidge.

Mr. Sandidge: Judge (Dawson), it's awful hard to satisfy you.

Q. Now, sir, did you know at the time that submission was made on September 23, 1958, for what you say was a request for an interpretation that the ballots had already been sent out by the union brotherhoods for a vote as to whether or not a strike would be authorized?

A. We knew—

Q. (Interrupting) If you people didn't pay this award without deduction. Did you know about that?

A. We knew that a strike ballot had been issued. We didn't know the result of it.

Q. How's that? Didn't know what?

A. We did not know the result of it, and we didn't know whether or not a strike ballot had been circulated by all of the organizations. But we knew there had been one circulated by one organization.

Q. Are you certain you didn't know it had been circulated by all of them?

A. I did not know that it had been.

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Q. All right. When the attempt to get a—an interpretation failed, and the case came back on—under date of December 17, 1958, did you then learn that a strike ballot had been distributed and a vote taken and a strike authorized?

A. I don't remember that we learned it, sir. I do remember that in the meeting on January 23rd that Mr. Mitchell said that a strike date would be set.

Q. That a strike—what he meant then was that a strike had been authorized, didn't he?

A. No, sir, I don't know that a strike had been authorized.

Q. Well, in your policies following the refusal of the Board to give you a so-called interpretation, did you meet with all the Brotherhoods, representatives of all the Brotherhoods?

A. Now, that was after what time, sir?

Q. After the December the 17th, 1958, when the Board refused to give you an interpretation.

A. Yes, sir. We met with—let me see if they were all here—we met with all the organizations on January 23rd.

Q. Was that the first meeting that you had had

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since the Board had turned you down?

A. I believe so.

Q. All right, sir. Now, on January the 23rd did you have a conference then with the authorities of all the Brotherhoods?

A. Yes, sir.

Q. And there you learned that the strike had been called, it had been favorable to a strike, and that the matter of calling a strike was up to the discretion of the officers having those matters in charge for the union, didn't you?

A. No, sir, I didn't know for sure that all of that had happened. I knew, and was told, that a strike date would be set, but I didn't know for sure that it had already been approved, and of course I didn't know how many organizations had decided one way or another on the strike.

Q. But you knew that they was going to set a date for the strike, didn't you?

A. That's what Mr. Mitchell said.

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MR. W. T. WALLACE, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. John P. Sandidge.

Mr. Sandidge: Will you state your name, please?

Mr. Wallace: My name is W. T. Wallace.

Q. And what position do you have with the L & N?

A. I'm assigned to the Personnel Department and my title is Staff Assistant.

Q. Is it part of your function to handle labor disputes concerning contracts?

A. Yes.

Q. Now, I wish to—wish you would tell us,

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first, Mr. Wallace, did you bring your file with you?

A. I have the file, yes.

Q. I will ask you first if you have a copy of a telegram that was received by the L & N Railroad from E. C. Thompson, Executive Secretary, dated February 10, '59?

Mr. Dawson: Secretary of what?

Q. Executive Secretary of the Mediation Board, National Mediation Board. That's a copy attached to the complaint.

Mr. Dawson: I think I'll object.

A. February 10, '59?

Q. Yes, sir.

Mr. Dawson (To the Reporter): Show an objection.

Q. What?

Mr. Dawson: I'm making an objection.

Q. But did you withdraw it?

Mr. Dawson: No, sir.

Q. I didn't think so. Your Honor, the telegram that we want to introduce is a telegram from the Mediation Board which is the formal procedure under the Act—

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Mr. Dawson (Interrupting): It can't possibly have any application to this situation. It's before another body, and this is—it may show something about the Mediation Board's intervention, but that's not involved in this case, and I'd like for Your Honor to take that as an avowal just like you did some of the testimony we offered to determine later on whether it's competent or not.

Q. This is the telegram from the Mediation Board informing the L & N Railroad Company that they had received a wire from the unions as to a strike and a strike date. This is the formal procedure that it's handled by.

Mr. Dawson: What's that got to do with this case?

Q. It's got plenty to do with it, Your Honor.

By the Court: Well, it's alleged in the complaint, and I presume it's denied, isn't it?

Mr. Dawson: Yes, sir.

Q. Yes, sir.

By the Court: All right. Will you read the telegram that you have in your file, sir?

A. The telegram is dated, "Washington,

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D.C., February 10, '59, addressed to W. S. Scholl, Director of Personnel, Louisville & Nashville Railroad Company, Louisville.

"Following wire received from Messrs. Brown, Gilbert, Paddock and Kennedy, 'Strike of Employees Represented by BLE, BLF&E, ORC&B and BRT on the Louisville and Nashville (Proper) set for Twelve Noon, Friday, February 13, 1959, account refusal of carrier to apply award 18,720, First Division NRAB. Please accept this telegram as seventy-two hour notice in cases of this kind.' Please wire statement.

"E. C. Thompson, Executive Secretary, National Mediation Board."

Q. All right. We would like to substitute a copy for the original in the record as Plaintiff's Exhibit 6.

(Whereupon, copy of telegram dated February 10, 1959, to Louisville & Nashville Railroad Company from E. C. Thompson, Executive Secretary,

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National Mediation Board, was received and marked by the Reporter as Plaintiff's Exhibit No. 6.)

Q. Do you have in your file a telegram sent to the—E. C. Thompson, Executive Secretary, National Mediation Board, dated February the 10th, 1959?

A. Yes, by Mr. Scholl.

Q. Will you please read that wire?

A. "Dated Louisville, Kentucky, February 10, '59; Addressed to E. T. Thompson, Executive Secretary, National Mediation Board, Washington 25, D. C.

"Your wire date relative strike set for noon Friday, February 13, 1959, of employees on this property represented by BLE, BLF&E, ORC&B and BRT in connection with application of Award 18720, First Division, NRAB.

"That award ordered Fireman Humphries restored to service with pay for time lost as the rule is construed on property. Humphries is back at work. Because unable to agree with Firemen's organization on deduction for outside earnings from pay for

time lost, carrier asked First Division, NRAB, for an interpretation of its Award 18720. On December 17, 1958, First Division held the dispute over deduction of outside earnings in determining amount due Humphries is new issue and could not be decided in the guise of an interpretation of Award 18720. Accordingly, on January 23, 1959, this new dispute was submitted ex parte by carrier to the First Division, NRAB, for decision. Copy of that submission covered by First Division file L-1479 being mailed you today. Since this dispute is now before NRAB for decision, threatened strike is clearly illegal under decision of U. S. Supreme Court in Chicago River and Indiana Railroad Terminal Company vs. Brotherhood of Railroad Trainmen, 353 U. S. 30.

"In addition to foregoing, BLF&E is only organization party to Award 18720 and dispute now pending before Adjustment Board, and BLE, ORC&B and BRT

have no legal right to strike about such award and dispute.

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"Respectfully submit Mediation Board should inform involved organizations that their strike threat is illegal and should be promptly withdrawn and the dispute handled to conclusion before Adjustment Board.

"Signed W. S. Scholl, Director of Personnel."

Mr. Dawson: We object to that and ask that it be stricken. Number 1, it has nothing to do with this case, and it is strictly self-serving.

Q. May it please the Court, it shows the response gain that was made and has been denied under the pleadings to the Mediation Board.

Mr. Dawson: Why of course.

Q. We have to notify them of these, and that's required by the Act. We simply want to show compliance with the Act, Your Honor.

By the Court: All right. It will be admissible for that reason.

Q. All right. Let's mark that the next plaintiff's exhibit.

(Whereupon, copy of telegram dated February 10, 1959, to E. C. Thompson, Executive Secretary, National Mediation

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Board, from W. S. Scholl, Director of Personnel, L & N Railroad Company, was received and marked by the Reporter as Plaintiff's Exhibit No. 7.)

Q. You also have in your file a telegram to the Louisville & Nashville Railroad signed by Mr.—or purported to be signed by Mr. Roadcup, Paschall, Mulinix and King dated February 10, '59?

Testimony of Mr. W. T. Wallace

A. Yes, sir.

Q. Will you read that telegram, please, sir?

A. Dated, "Louisville, Kentucky, February 10, 59; Addressed to W. S. Scholl, Director of Personnel, Louisville & Nashville Railroad, 908 West Broadway, Louisville.

"This will advise employees represented by BLE, BLF&E, ORC&B and BRT will withdraw from carrier's service at 12:00 noon Friday, February 13, 1959, in a joint legal strike approved and authorized by the Brotherhoods' chief executives due to carriers adamant insistence that outside earnings of Fireman Humphries must be deducted from any money due him under Award 18720."

It's signed by H. J. Roadcup, Jake Paschall, L. G. Mulinix, J. M. King.

Q. I ask that that be marked as an exhibit, next plaintiff's exhibit, and be admitted into the record of course to show the imminence of the strike, Your Honor.

(Whereupon, copy of telegram dated February 10, 1959, to W. S. Scholl, Director of Personnel, Louisville & Nashville Railroad, signed by Messrs, H. J. Roadcup, Jake Paschall, L. G. Mulinix and J. M. King was received and marked by the Reporter as Plaintiff's Exhibit No. 8.)

Mr. Dawson: All of this is irrelevant and incompetent because neither the statute nor the contract requires any notice to the Mediation Board in regard to this.

Q. As to this particular section, Your Honor, the telegram, our purpose of course, is to show the imminence of the strike, and that's necessary, I believe, before we're entitled to an injunction.

Mr. Dawson: I didn't catch that. What did you say, John (Sandidge)?

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Q. To show the imminence of a strike before we're entitled to an injunction.

Mr. Dawson: Where do you get that law?

Q Well, that has always been the law.

Mr. Dawson: Well, now, you say it's always been the law. Where do you get it?

Q. Well, I'll present it when the time comes.

Mr. Dawson: Well, you don't find it in the statute, do you? We just don't think there's any use putting in something that has no reference here.

It's just going to make somebody pay for something they don't want.

By the Court: Well, I think it's proper. It's admitted in evidence. Let's continue.

Q. All right, sir. Mr. Wallace, is it also your duty at the L & N—(To the Reporter) Strike that question.

When did you first become familiar with the Humphries dispute?

A. Well, from the time it was submitted by the Division officials to the Director of Personnel

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following the investigation and before the disciplinary action was taken.

Q. All right. Did you prepare the submission on the dispute that was submitted to the Adjustment Board under the date of June 13, 1957?

A. I prepared—wrote the submission, yes.

Q. All right, sir. Do you have a copy there with you?

A. I do.

Q. We won't read that, Your Honor. I would like to introduce into evidence the—

A. (Interrupting) June the 16th, 1957.

(Mr. Sandidge Hands Document to Mr. Dawson.)

Mr. Dawson: What are you going to do with this, file it?

Q. Yes, sir.

Mr. Dawson: This couldn't be the original. That's up at the Board.

Q. This is run off on a mimeograph. I'd like to file this as the next plaintiff's exhibit, Your Honor, if I may.

(Whereupon, Submission of Dispute Dated June 13, 1957, From Louisville

& Nashville Railroad Company to J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, was Received and Marked by the Reporter as Plaintiff's Exhibit No. 9)[1]

Q. Now, Mr. Wallace, did you receive in response to the submission of June 13, 1957, a response from the union?

A. Yes, sir, they made a submission to the Board and a copy furnished the railroad.

Q. Do you have a copy with you?

A. Yes.

(Mr. Sandidge Hands Document to Mr. Dawson.)

Q. We would like to introduce this as the next plaintiff's exhibit.

(Whereupon, Submission of Dispute Dated September 10, 1957, From Brotherhood of Locomotive Firemen and Enginemen to J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, Was Reecived and Marked by the Reporter as Plaintiff's Exhibit No. 10.)

[1]Plaintiff's Exhibit No. 9 at the Oral Hearing is printed in this Appendix, pp. 91b-114b, *infra*.

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Q. Now, concerning the request for a submission for the interpretation of the award, did you prepare that request on behalf of the railroad?

A. I did, sir.

Q. Do you have a copy of that with you?

A. (Nods head affirmatively.)

Q. The request dated, for interpretation, dated September 23, 1958.

(Mr. Sandidge Hands Document to Mr. Dawson.)

Mr. Dawson: Why in order to keep the thing in sequence didn't you file the copy of the award and this?

Q. This has already been filed, Judge (Dawson). I'm just proving it by the man that did it.

Mr. Dawson: Okay.

Q. I'd like to introduce this as the next plaintiff's exhibit.

(Whereupon, Copy of "First Division Award 18720 —Request For Interpretation" Dated September 23, 1958, From Louisville & Nashville Railroad Company to J. M. MacLeod, Executive Secretary, First Division, National

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Railroad Adjustment Board, Was Received and Marked by the Reporter as Plaintiff's Exhibit No. 11.)[1]

Q. And you are also the one who prepared the railroad submission of January 23 1959, are you not?

A. Yes, sir.

Q. And I'll ask you to look at Plaintiff's Exhibit 3, and is that what you prepared and submitted?

A. Yes, sir.

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[1]Plaintiff's Exhibit No. 11 at the Oral Hearing is printed in this Appendix, pp. 115b-125b, *infra*.

Testimony of Mr. W. T. Wallace

Q. Now, Mr. Wallace, concerning the submission, the first one, original one, of June 13, 1957, and the reply thereto filed by the Brotherhood, did the Brotherhood raise any issue concerning wages?

A. No, sir, other than the thing that states the time lost.

Q. Will you speak a little bit louder, please?

Mr. Dawson: Wait a minute. I think we want to make an objection. The record shows it's that you filed just a minute ago, the submission of the Brotherhood, let's look at that.

By the Court: Well, of course the response will show it. But let's move along, gentlemen.

Q. All right, sir. Now, Mr. Wallace,—(To the Reporter) Strike the question.

Mr. Wallace, when did you say you started handling the matter for the railroad?

A. Beginning April 1, 1948.

Q. All right, sir. Now, I wish you would tell the Court whether or not it has been the practice of the railroad, as far as the Firemen's union is concerned, to, when an award has been granted, either to deduct or not deduct outside earnings during the period involved?

A. Since I've been handling the matter, it has been the policy of the railroad to consider outside earnings, and if the man—

Mr. Dawson (Interrupting): Well now, answer the question. We insist.

Q. Now, Your Honor, this is my witness—

Mr. Dawson (Interrupting): Wait a minute. But he can't answer the question—

By the Court (Interrupting): Judge (Dawson), you'll have him on cross-examination.

Mr. Dawson: It would save some time if he'd answer the question they asked him.

Q. Your Honor, I'll ask that I be permitted

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to examine my witness.

By the Court: All right. As I understood it, you asked him what the policy of the company was as to consideration of outside earnings.

Q. Now, what has been—(To the Reporter) Strike that question.

Concerning awards confined to settlements, is the gross amount of the award always paid?

A. Well, we never pay the gross amount. There are certain deductions that have to be made under the law: income tax, state tax, railroad retirement, reimbursement to the railroad retirement board, if any unemployment has been paid while the man was out of railroad service.

Q. Now, concerning your dealings with Mr. Paschall, did Mr. Paschall have any notice concerning the policy of the railroad on this matter?

A. Yes, sir.

Q. How was he—how did he get that notice?

A. Well, we had a previous case that I handled personally involving Fireman T. Y. Alston in which we called, the railroad called on Fireman Alston for a

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statement of his earnings in outside employment while out of L & N service. Fireman Alston gave us a letter in which he certified that he had no outside employment.

That information was passed to Mr. Paschall by correspondence in connection with the settlement of money due him under the award.

Q. Do you have that correspondence with you?

A. Yes, sir. (Witness Examines File) On June 17th, 1955—

Mr. Dawson (Interrupting): Let me see the letter he's going to testify about.

Q. All right, sir.

A. That's where I called on—

Q. (Interrupting) Where is the letter to Mr. Paschall?

A. August 26, 1955. There's an extra copy in there if you want it.

Q. Did you prepare this letter?

A. I did.

(Mr. Sandidge Hands Document to Mr. Dawson.)

Q. Now, while they're examining the letter I wish you would look in your file and make a note also of

the correspondence you had with the man.

A. Is this Mr. Alston?

Q. Yes.

A. I have a letter here from Mr. Alston.

Q. All right. Now, first, I wish you would pull out of the file your letter to Mr. Alston concerning the calculation of his pay?

A. Well, now, we wrote the Division Superintendent and asked him to call on Mr. Alston for the information.

Q. Did you get a letter from Mr. Alston?

A. We have a letter from Mr. Alston in our file addressed to the Master Mechanic dated June 1st, 1959.

Q. All right.

(Mr. Sandidge Hands Document to Mr. Dawson.)

Q. Now, are you the regular custodian of these records in the L & N?

A. Yes.

Q. And these things come to you in the ordinary course of business, do they not?

A. Yes.

Q. All right. What did Mr. Alston advise

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the L & N?

A. Mr. Alston says,

> "This is to advise that I have made no money in outside employment since my dismissal in February, 1953, as I have been unemployed since that time."

Q. All right. I'd like to file this as the plaintiff's next exhibit, if it please the Court.

(Whereupon, Letter Dated June 21, 1955, to C. A. Elkner From T. Y. Alston Was Received and Marked by the Reporter as Plaintiff's Exhibit No. 12.)[1]

Q. Now, concerning the letter to Mr. Paschall of August 26, 1955, I would like to introduce that as the next exhibit and ask you to read that to the Court.

Mr. Dawson: Well, now, wait a minute.

Q. Sir?

Mr. Dawson: What is that one you've got there now?

Q. The same one you had.

Mr. Dawson: Well, the letter speaks for itself and is considered read.

Q. No, sir. We'd like to read it to the

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Court, Your Honor, to show that the question was raised and the Court's mind may be satisfied.

A. The letter is dated August 26, '55, addressed to Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, Louisville, Kentucky:

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[1]Plaintiff's Exhibit No. 12 at the Oral Hearing is printed in this Appendix, p. 125b, *infra*.

Testimony of Mr. W. T. Wallace

"Please recall our conversation yesterday concerning money payment due Fireman T. Y. Alston, Nashville Terminals, under First Division Award No. 17030.

"Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board, which, of course, have to be deducted from the amount due him.

"Fireman Alston advises that he would have claimed the highest rated seven-day per week assignment in the Nashville Terminals during the period in question, which he no doubt could have done, as, we understand, he is the senior fireman on the roster. He also

says he would have worked every day, including holidays, during the approximate two years and five months period, which does not seem reasonable to us. In order to determine with what regularity Fireman Alston worked prior to his dismissal, we have secured statement of his gross earnings for the five year period 1948 through 1952 and divided this amount by the average yard rate in effect during that period. This indicates that he worked on an average of 321.10 days out of a calendar year of 365 days. Statements showing above information are attached for your information and file. We also attach statement showing that on this basis during the period from February 14, 1953, to June 27, 1955, Fireman Alston would have earned a gross amount of $11,629.63. From this amount will have to be deducted withholding tax amounting to $1,231.46, railroad retirement tax in the amount of $567.22, and $3,627.55

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to be refunded to the Railroad Retirement Board, leaving a net of $6,203.40 to be paid Mr. Alston.

"In order that you may have full information as to how the statements in question were prepared, we are also attaching copy of Superintendent James' memorandum of August 24, 1955.

"Please advise if settlement on this basis is acceptable and, if so, we shall issue instructions for payment to be made accordingly,"

Q. And was that case settled on that basis?

A. The case was finally settled on—primarily on that basis, with some exceptions. But it was settled in the gross amount of $12,320.42.

Q. And what deductions were made?

A. From that amount was deducted Railroad Retirement Tax, $526.44; Withholding Taxes, $1,416.18; Railroad Retirement Board for benefits paid, $3,627.55, leaving a net amount of $6,750.25.

Q. All right, sir. I'd like to introduce that as Plaintiff's Exhibit 13.

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(Whereupon, copy of letted dated August 26, 1955, to Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen & Enginemen, from Director of Personnel, L & N Railroad Company, was received and marked by the Reporter as Plaintiff's Exhibit No. 13.)

Q. Now, concerning the award that was made by the Board to Mr. Humphries, did you write a letter to Mr. Humphries concerning the settlement of that award?

A. I didn't write Mr. Humphries. I wrote the superintendent to handle with Mr. Humphries for that information.

Testimony of Mr. W. T. Wallace

Q. All right. Now, did you get an answer from Mr. Humphries?

A. I had an answer through the superintendent.

Mr. Dawson: Well, wait a minute.

Q. Sir?

Mr. Dawson: Now, we object to him now undertaking to relate second hand what Mr. Humphries may have said.

Q. Wa the letter addressed to the

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superintendent and forwarded to you?

A. I did not receive a letter signed by Mr. Humphries.

Q. All right. In any event—well, when was the next thing that you heard concerning the dispute about outside wages being deducted after the award?

A. Well, the first thing was two days after the award was issued Mr. Paschall wrote and asked us to put it in effect, and we replied to him that we were instructing that Mr. Humphries be put back to work and that he be called upon for a statement of any outside earnings.

Q. All right. Now, do you have a copy of the letter from Mr. Paschall?

A. The letter to Mr. Paschall.

Q. The letter to Mr. Paschall, yes, sir.

A. Yes, sir. May 17, 1958.

(Mr. Sandidge hands document to Mr. Dawson.)

Q. I ask that the letter of May 17, '58, be introduced as the next plaintiff's exhibit.

(Whereupon, copy of letter dated May 17, 1958, to Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen & Enginemen,

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from Director of Personnel, L & N Railroad Company, was received and marked by the Reporter as Plaintiff's Exhibit No. 14.)[1]

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[1]Plaintiff's Exhibit No. 14 at the Oral Hearing is the same as the Exhibit printed in Appendix of Defendants-Appellants, p. 53a.

Testimony of Mr. W. T. Wallace

Q. I'll ask you to read to the Court merely the second paragraph of the letter which is pertinent.

A. (Reading) "Instructions are being issued today to cover Fireman Humphries' restoration to the service. A prompt check will also be made to determine his loss of wages during the period of his dismissal, and Mr. Humphries will be asked to furnish a statement of his earnings in outside employment during that same period. When these amounts are known we will be glad to confer with you as to what money payment is due Fireman Humphries under the Award."

Q. Now, did you receive a reply from Mr. Paschall?

A. We did, May 20, 1958.

(Mr. Sandidge hands document to Mr. Dawson.)

Q. I ask that this be filed as the next plaintiff's exhibit.

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(Whereupon, letter dated May 20, 1958, from Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, to W. S. Scholl, Director of Personnel, Louisville & Nashville Railroad Company, was received and marked by the Reporter as Plaintiff's Exhibit No. 15.)

Q. Mr. Wallace, will you please read that letter into the record?

A. This letter is addressed to Mr. W. S. Scholl, Director of Personnel, by Mr. Jake Paschall and reads:

"This will acknowledge your letter of May 17th, 1958, file L-306-9, with reference to the reinstatement of Fireman-Engineer B. G. Humphries with pay for time lost in accordance with Award 18720 of the First Division, National Railroad Adjustment Board.

"You stated that instructions are being issued to cover his restoration to the service, that a prompt check will also be made

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to determine his loss of wages during the period of his dismissal and that Mr. Humphries will be asked to furnish statement to show his earnings in outside employment during that same period, after which you will confer with me as to what money payments are due him under Award 18720. Your attention is respectfully directed to the wording of Award 18720, which is as follows:

'AWARD: Claim sustained with pay for time lost as the rule is construed on the property.'

"Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board. In this connection your attention is directed to Awards 5248, 16245, 17030, and 17644 of the First Division, National Railroad Adjustment Board, in which earnings in

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outside employment were not deducted from the time lost payment, and there are many other Awards. In these cases payments were made for full time lost without any deduction for earnings in outside employment. Accordingly, we will expect Mr. Humphries to be paid for full time lost.

"Please advise."

Q. Now, after the receipt of that letter was there a conference that you were present with the union's members discussing this matter?

A. There may have been a conference. Although, as Mr. Clark testified, I was in charge of the conference and he has the records, and I handled the correspondence mainly.

Q. All right.

A. And I wrote to Mr. Paschall a few letters concerning the matter of deduction of outside earnings.

Q. Now, I didn't hear that last. Somebody coughed.

A. I said, I did write Mr. Paschall a further letter concerning the matter of deduction of

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outside earnings.

Q. All right. Do you have that correspondence?

A. That was on June 26, 1958.

(Mr. Sandidge hands document to Mr. Dawson.)

Q. I'll ask that the letter of June 26 be admitted as—into evidence as plaintiff's next exhibit. And I will not ask the witness to read the letter. It's rather lengthy.

(Whereupon, copy of letter dated June 26, 1958, to Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen & Enginemen, from Director of Personnel, Louisville & Nashville Railroad Company, was received and marked by the Reporter as Plaintiff's Exhibit No. 16.)[1]

Q. But I will ask you this about the letter of June 26, 1958. Was it your purpose in writing that letter to set forth the position of the railroad in that matter?

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A. That was the purpose of the letter.

Q. And to answer Mr. Paschall's letter?

A. Right, of May 20, '58.

Q. All right, sir. Now, I will ask you, after this letter

[1]Plaintiff's Exhibit No. 16 at the Oral Hearing is the same as the Exhibit printed in Appendix of Defendants-Appellants, pp. 56a-60a.

of June 26th was written, 1958, you apparently prepared the submission for the question on interpretation, is that correct?

A. Yes.

Q. Now, why, after the award was received was the submission of January the 23rd, 1959, submitted to the Board?

A. Well, in response to the carriers request on the Fourth—First Division for an interpretation of the ward wherein it ordered Fireman Humphries restored to service with pay as the rule was construed on the property, we had numerous conferences, discussed the matter by correspondence also, and were unable to arrive at an agreement as to the construction of the rule.

And on January 23, 1959, I was present at the conference, which all four of the Brotherhoods and their vice-presidents were present, which Mr. Mitchell told us that a strike date would be set. We explained to the

representatives of the men that there was a legal and orderly way to settle the new dispute concerning the deduction of outside earnings and that they should join us in submitting the matter to the Board for determination, which they refused to do.

It was, and still is, the carrier's opinion that that was the only proper and legal way under the Railway Labor Act to decide such a matter.

Q. Now, why did you think you could submit this to the Board after the interpretation by the Board?

A. Well, the interpretation, the Board said, to us, that this was a new issue—

Mr. Dawson (Interrupting): Now, we object to what the Board said. It speaks for itself there.

Q. Well, Your Honor, he's explaining to you—the question of good faith is here, and I think he's entitled to

tell you why they thought they could submit it.

Mr. Dawson: He's not entitled to give a false statement about what the Board said.

Q. He's entitled to testify, Judge, without interruption.

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By the Court: Yes. I think that's proper. You may answer, Mr. Wallace.

A. The interpretation as issued by the First Division said that the question was a new issue which they could not interpret in the guise of an interpretation of the question previously decided by it.

So it was a new issue, and there was only one thing to do if we couldn't decide it on the property, and it was to submit that new issue to the Board, and that's what we did.

Q. Now, there's been testimony concerning rules of the Board. I will ask you to look at your submission, and I wish you would tell the Court whether or not there are rulings from the Board, both ways, on the question of whether or not outside earnings can be deducted from the award?

A. There are numerous awards from the Board involving the payment of time lost to employees on various conditions and those awards vary. Some say deductions without pay, some—without outside employment, some specifically specify the men will be paid loss time less earnings in outside employment. In some cases for

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various reasons the Board may order a man restored and paid for half of the time he was out of service. There have been such awards as half time for half drunk. There have been all kinds of awards from the Adjustment Board on the matter of payment to employees for time lost.

Q. Now, didn't you cite them in your submission, Award No. 5862, of First Division, Referee Fox, and isn't that contained on Page 5 of your submission?

A. Yes. Excerpts on Award 5862 are quoted beginning at Page 5 of my submission.

Q. All right. Now, don't you also have some law in Kentucky on this problem?

A. Yes. That also was referred to in the submissions, being a case involving pay claimed by an L & N conductor and involving Article 31—

By the Court (Interrupting): Now, I've read that section there.

Q. All right, sir. The only point that I'm making now, Your Honor, is that what he was going on, and that is the basis for it and our good faith, and I think it's material to that issue alone.

Mr. Dawson: We submit that the

question is what was the rule on the property, not how some Board or some court had decided about deductions.

Q. All right. We're still getting to that problem, Judge (Dawson), if we may.

Now, based on that, on those authorities, plus others—are there any other authorities concerned in this matter?

A. Well, there are many awards of the Adjustment Board going to the matter not involving L & N cases, on other railroads.

Q. Concerning whether pay can be deducted from awards?

A. Yes, sir, whether outside earnings should be deducted when a man is ordered restored with pay.

Q. All right. Now, were you given the job of preparing this and submitting it based on that information?

A. Based on the information of the Board award and in practice on the property as long as I was in Personnel, and so forth, yes.

Q. One final question. Did you bring with you the contract involved with all these unions?

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A. I have copies of all, yes.

(Mr. Sandidge hands documents to Mr. Dawson.)

Mr. Dawson: Are you giving me those?

Q. We're going to file them. For purposes of the record, Your Honor, we would like to file by this witness a copy of the agreement between the L & N Railroad and the Locomotive Firemen and Hostlers dated July 1, 1956, the agreement between the Louisville and Nashville Railroad and the Locomotive Engineers, revised to January 1, 1950, the Louisville & Nashville Railroad agreement with the Conductors, dated May 1, 1956, and the agreement of the L & N Railroad Company with its Baggagemen, Brakemen, Flagmen, Yard Foremen, Switchmen, Switch Tenders and Herders, current up to May 1, 1953.

We'd like to introduce those as one exhibit purely for the purposes of the record, if the Court would like to see them.

(Whereupon, agreements between the Louisville & Nashville Railroad Company and its Baggagemen, Brakemen, Flagmen, Yard Foremen, Switchmen, Switch Tenders and Herders; agreement

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between the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers; agreement between the Louisville & Nashville Railroad Company and its Conductors; and agreement between the Louisville & Nashville Railroad and its Locomotive Engineers rereceived and marked collectively as Plaintiff's Exhibit No. 17.)

Q. (To Mr. Dawson) Your witness.

Testimony of Mr. W. T. Wallace

Cross-examination by Mr. Charles I. Dawson.

Mr. Dawson: Mr. Wallace, you say you have been connected with the L & N Railroad since 1948?

Mr. Wallace: No, Judge (Dawson), I've been in the Personnel Department since 1948. I've been connected with the railroad since September, 1929.

Q. I understood you to say a while back on cross—on direct examination that you have been handling the correspondence file, is that right?

A. That is right, sir.

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Q. Between the railroad and the unions relative to—to disputes in controversy, is that right?

A. Mainly in respect to discipline, yes, sir.

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Q. Who was the Personnel Director in 1945 for the Louisville and Nashville Railroad Company?

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A. To the best of my knowledge it was Mr. G. C. Howard.

Q. And who was the Personnel Director in 1948 for the company?

A. Mr. G. C. Howard.

* * * * * * *

Q. Now then, what was the controversy after the award was made in the Humphries case? What was the controversy between you and the unions representing Mr. Humphries?

A. The question of his earnings in outside employment.

Q. So the controversy was not what the Board in some other case or some referee had decided, but the real controversy was what was the meaning of Rule 31

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as construed on the property of the L & N, wasn't that the controversy?

A. That was the controversy, sir.

Q. And Rule 31 is the rule which in part provides, "If the discipline administered is not sustained, it will be canceled and the Fireman in question will be paid for any time lost by him resulting from the investigational action taken." You're familiar with that rule, aren't you?

A. I am.

Q. Now, the controversy between the railroad represented by you and the Brotherhood was, whether on that company's line that rule had been construed as permitting the railroad to deduct outside earnings in a case such as that presented in the Humphries case, is that right?

A. That was the primary issue.

Q. And you understood, did you not—it didn't make any addition—any difference what any other court had decided or what the Board decided, you understood that the question was what was the understanding on the part of the railroad and the union as to how this rule should be construed on the L & N. You understood that was

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the real situation, didn't you?

A. The question for consideration was the application of the Board award wherein the First Division ordered us to restore Mr. Humphries to service and to pay him in accordance with the way the rule was construed on the property.

Q. On the property. So the big question was whether the rule had been construed by the union and by the railroad to permit the deduction of outside pay, wasn't it?

A. That was the question.

Q. And that was the only question, wasn't it?

A. If we could have decided that, we wouldn't be here.

Q. There never has been any question about deducting from the back pay, the withholding tax, social security, and things of that sort, has there?

A. That's true.

Q. Because that was specifically provided by law, is that right?

A. That's right.

Q. And there wasn't any controversy about

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that?

A. Couldn't be.

Q. Now, I want you to tell the Court in all of your experience as an employee connected with the personnel problems of the railroad do you know of a single case where the union ever agreed in the settlement of back pay awards in a situation such as the Humphries case? I say, do you know of any case where the union ever knew—

A. (Interrupting) I don't know of any—

Q. (Continuing) —that you might make any such deduction?

A. I don't know of any case where that question ever came up to the issue till this case.

Q. Well, how could you say that the rule as construed on the property was permitting you to deduct it?

A. Judge Dawson, we had construed that rule from the management standpoint over and over again. We had so construed it in the Alston case. We so advised the organization we so construed it in the case of Yardman Neal.

Now, it's true we did not have an interpretation that was agreed to by both—

Q. (Interrupting) Do you know—

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Mr. Sandidge (Interrupting): Just a minute. Let him answer.

A. We had interpreted that rule through the years that where a man had outside earnings that we were privileged to deduct it.

Now, very apparently, the organization had construed otherwise, and when we come up to a case where we've got this question now we have—were unable to get an agreed to interpretation, and there was one way to get it, and that was to go to the Adjustment Board, and that was according to the procedure set up under the Railway Labor Act.

The Board had told us that was a new issue, and that's where we took it.

Q. Now, you've made your speech, let me ask you a question.

Mr. Sandidge: All right. We'll listen to you, Judge (Dawson).

Q. You know what this Rule 31(f) is, don't you?

A. 31 is the—I wouldn't say (f).

Q. Well, which one—

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A. (Interrupting) I know Article 31, yes.

Q. And they call it a rule, but it's really written into the contract between the L & N and the Firemen, isn't it?

A. That agreement is a contract.

Q. Now, have you known, do you know of any way by which one party to a contract can change it without the consent of the other?

A. Judge (Dawson), I'm not a lawyer, but I don't know that you can.

Q. Well, don't you know that he can't?

A. As far as I know, I'll have to agree with you, you can't do it except by agreement.

Q. That's right. And now you're claiming that you—

and by "you" I mean the railroad—have unilaterally determined that that's the construction you're going to put on this contract?

Mr. Sandidge: I object to the question, Your Honor. We haven't—

By the Court (Interrupting): Yes. Gentlemen, as I see it, the interpretation of that clause of the contract would properly be before this Court if the

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complaint in here had filed a suit in the District Court to enforce this award. I think then perhaps it might be properly before this court. Otherwise, I think only on the question of whether a dispute exists or not as to the good faith of the railroad in—in making the second submission is this line of testimony possibly admissible.

Q. Well, now, Your Honor, they say they had this agreement as to how the rule was construed on the property, in the meaning of that award. And he says now that the rule was construed so that they could make the deductions, and I say this is just as competent to the defense as anything they have offered in here on direct examination, and it certainly is competent because we want to see now if the railroad claims that its unilateral attempt to apply this rule without the consent of the union creates any such dispute as to what the meaning of the contract as construed on the property as to justify this attitude of the railroad in trying to go back and have it re-examined by the Adjustment Board.

Mr. Sandidge: May it please the Court, we concede there is a dispute. We have tried to show the Court what the dispute is about—

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By the Court (Interrupting): I think Judge Dawson is attempting to show that there is no dispute because of the clear meaning of the contract, is that true, Judge Dawson?

Q. Yes, sir. But not only that. He's trying to show that over all these years they have construed it that way.

Now, why am I not permitted to show that they never have been construed that way?

Mr. Sandidge: I think he might be permitted, Your Honor, to do that.

Q. That's what I'm doing exactly.

Mr. Sandidge: But at the same time he's testified exactly as to what the construction was by management and why, and that's the basis of the dispute between the two parties, and if there is a legitimate dispute, if there's any kind of a dispute, between the parties, that's a matter for the Adjustment Board.

By the Court: Well—As I stated earlier, the interpretation of this Clause 31—

Mr. Sandidge (Interrupting): (f), yes, sir.

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By the Court (Continuing):—of the confract, I do not believe that is an issue in this court. That's not for this court to determine, what the proper interpretation of it is. Do you agree on that, Judge Dawson?

Q. No, sir.

Mr. Sandidge: I do.

Q. I—if you want to get your tail in a crack, John (Sandidge), go ahead.

Mr. Sandidge (To Mr. Dawson): I'm not in a crack. You're in the crack right now, Judge (Dawson).

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By the Court (Interrupting): Gentlemen, let me ask you this. The issue for this court to determine is whether or not a dispute exists, and whether that dispute has been submitted to the Adjustment Board.

Now, on the other hand, do you contend that the issue here is the interpretation of that particular clause of the contract?

Q. That's right, and that's all there is

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here.

By the Court: I mean, you are asking—asking me to interpret this contract?

Q. No, sir.

By the Court: As to the meaning?

Q. No, sir. No, sir, I'm not asking you to do that. But I'm saying that in view of the facts here, and we have plead them, that the alleged issue they're trying to take up there now is purely a fraudulent issue, and there's no basis for raising it at all.

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Mr. Sandidge: May it please the Court, it's our position that we do not have to take the union's construction of the contract, either. We have tried to show Your Honor that there is a legitimate dispute between the parties and that when there is such a dispute then that is properly referrable under the Act to the Board, and that's exactly what we have done, and that is now pending in the Board, and for that reason, under the Chicago River case, we are clearly entitled to an injunction.

Q. The full strength of our answer is that they have made a fictitious issue when they knew there was no faith in it—no basis for it, merely for the purpose of running back to the Adjustment Board a third time.

Q. Now, if they can prove that they had practiced making deductions, which they can't prove—I challenge him to show a single case on the railroad, the L & N Railroad, where you deduct them, outside earnings.

Mr. Sandidge: The contention is

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that's been consistently made, Your Honor.

Q. (To Mr. Sandidge) Just a minute.

Mr. Sandidge: Excuse me, Judge (Dawson).

Q. And I— we want to show that the contention has never been made by the union specifically not a single time, and the nearest they came to it was the letter they wrote about this fellow over there—what's his name—Neal—and that was promptly rejected, any claim that they had a right to make the deduction.

Now, if they—if they want to prove there was a controversy, we're certainly entitled to plead—to put the facts in, because we say that it was a spurious, fictitious issue that they tried to cook up to get back to the Readjustment Board—I mean, the—the Adjustment Board a third time.

Now, how many times can a thing be chewed over even in the—in the Adjustment Board, especially when it apparently takes them five years to chew it up one time.

Mr. Sandidge: May it please the Court, that's a controversy concerning this rule. There's no evidence, and there is none, that this Rule 31(f) ever

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came into controversy until after the award was made.

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By the Court: Well, that—

Q. (Interrupting) * * *

I think, Your Honor, you are going to be faced right in this case, even if you conclude that the National Adjustment Board ought to be given an opportunity—I

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think Your Honor will be confronted with exactly the same situation the District Judge in New York was confronted

with who resorted to the same rule, that common sense dictates, and that is, "I'm going to let this thing ride for a while, but if by a certain date you haven't gotten some action on that submission up there, I'm going to destroy this injunction."

By the Court: Judge (Dawson), we might be wasting a lot of time here if we can enter a dissent (sic) decree. I think the Adjustment Board certainly should make a ruling within a reasonable time.

I think Judge Dawson in New York was proper in setting a time, a reasonable time for the Board to act.

Q. Well, I want to say to you that I told my associates three weeks ago that if I was sitting in this case I would say, "Well, I won't for the present undertake whether that case is up there or it isn't up there or whether the Board is going to take jurisdiction to decide it or not, but I'd give them a reasonable time to get action, and if the (sic) hadn't gotten it by that time I was going to dissolve this injunction." * * *

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By the Court: Well, gentlemen, this case suddenly has taken a turn here that I think it might be well for counsel to discuss. And it's 4:30, and I think this might be a good time to adjourn until tomorrow morning, and that will give counsel an opportuinty to—

Mr. Sandidge (Interrupting): Yes, sir.

By the Court (Continuing): —to discuss this turn that this case has taken.

* * * * * * *

PLAINTIFF'S EXHIBIT No. 9 AT ORAL HEARING.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville, Kentucky

June 13, 1957

L-306-9

Mr. J. M. MacLeod,
Executive Secretary, First Division,
National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

Below is the Carrier's ex parte submission in the claim of the Brotherhood of Locomotive Firemen and Enginemen described as follows:

"Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Art. 31."

CARRIER'S STATEMENT OF FACTS:

Fireman Humphries was employed as locomotive fireman, April 5, 1944.

On Feb. 15, 1956, claimant Humphries came onto company property at Louisville, Ky., while he was off duty and engaged in two separate disturbances involving two employes who were on company property and performing their duty.

On Feb. 17, 1956, charges were preferred against Fireman Humphries as follows:

Plaintiff's Exhibit No. 9 at Oral Hearing

"You are charged with assaulting two employes who were on duty on company premises February 15, 1956, and violation of Rule G-4.

"Investigation of these charges will be conducted in Room 200, Union Station, Louisville, at 9:00 A.M., Thursday, February 23, 1956.

"Please arrange to be present with your representative if you desire one, and any witnesses you may desire to testify in your behalf.

"Please acknowledge receipt of this letter.

Yours truly,

(s) E. E. Sullivan,
Asst. Superintendent."

On Feb. 23, 1956, the Claimant was advised of a postponement of the investigation by letter from Mr. E. E. Sullivan, Asst. Superintendent, reading in part, as follows:

"At the request of General Chairman J. Paschall, BLF&E, this investigation has been postponed to a later date, of which you will be advised."

On Feb. 25, 1956, the Claimant was again written as follows:

"Please refer to my letter of Feb. 17th, 1956, charging you will (sic) assaulting two employes who were on duty on company premises Feb. 15th, 1956, and violation of Rule G-4, setting the investigation for 9:30 A.M., Thursday, Feb. 23, 1956; also my letter of Feb. 23rd postponing the investigation to a later date.

"This investigation will now be held in Room 200, Union Station, Louisville, Ky., at 8:30 A.M., Tuesday, February 28th, 1956.

Plaintiff's Exhibit No. 9 at Oral Hearing

"Please arrange to be present with your representative, if you desire one, and any witnesses you may desire to testify in your behalf.

Yours truly,

(s) E. E. Sullivan,
Asst. Superintendent.'

Formal investigation was conducted at Louisville, Ky., on Feb. 28, 1956, resulting in the dismissal of Fireman Humphries on March 31, 1956.

Statements taken at the investigation are attached hereto as Carrier's Exhibit "AA".

POSITION OF CARRIER:

Rule G-4 mentioned in the charge reads as follows:

"G4. No person who is vicious, profane, or uncivil in deportment shall be employed or continued in the service."

L. & N. Police Sgt. E. Haynes testified that on Feb. 15, 1956, two employes complained to him that they had been struck by the claimant. Both of these men (Fireman F. R. Meeks and Switchman A. F. Beckert) were called as witnesses.

Hostler Helper Meeks testified that the Claimant had struck him in the eye while he was on duty at the Callers' Office at the South Louisville Roundhouse, about 8:00 P.M. He said that the Claimant made a practice of "smacking" at him because they had both been fighters in their younger days. While he was not asked about the statement attributed to him by two police officers who testified before him to the effect that he intended to kill Claimant Humphries if he ever struck him again, he did admit that he told them about being hit by the Claimant.

Plaintiff's Exhibit No. 9 at Oral Hearing

Switchman Beckert testified that the Claimant accosted him about 6:50 P.M., while he was on duty at the 10th St. Roundhouse and, after inquiring about his work record during the strike of 1955, hit him on the side of the head.

Claimant Humphries admitted that he was slapping at Hostler Helper Meeks in the Callers' office at South Louisville but explained it away by saying that they "are always playing around slapping with each other." He admitted going to the 10th St. Roundhouse and engaging Switchman Beckert in conversation and asking him about his work record during the strike of 1955. His account of their meeting corroborated Switchman Beckert's testimony except that the Claimant denied strking Mr. Beckert.

During the investigation and the handling on the property, the General Chairman complained of the fact that Hostler Maddox was not at the investigation due to the fact that "* * * neither we or the officers of the railroad have been able to locate him * * *."

It is regrettable that Mr. Maddox could not be at the investigation but, at best, his testimony would have been negative and to the effect that he had seen no blows struck in his presence. He was only present at or near the point where Switchman Beckert was accosted and did not see the incident at the South Louisville Roundhouse or hear Mr. Meeks' account of it in the presence of the police officers.

The General Chairman also contended that Article 31, section (d) was violated due to the fact that the investigation was held on Feb. 28th, and the Claimant was not notified of his dismissal until March 31st. Article 31, section (d), reads as follows:

> "(d) Within ten days after the close of the investigation unless further time is mutually agreed upon, the proper officer will notify the party in question of the decision and action. If the decision is unsatis-

Plaintiff's Exhibit No. 9 at Oral Hearing

factory, the party in question has the right to appeal to the Director of Personnel, except that in cases pertaining exclusively to mechanical matter, the appeal will be made through the Superintendent of Machinery.

"Note: It is understood that the investigation will not be considered as closed until the papers have been approved by the Management."

The papers were not approved by the Management until March 30, 1956, and therefore the rule quoted above was not violated.

The Carrier had the responsibility of weighing the evidence developed at the investigation and deciding what conflicting testimony to believe or disbelieve.

In the incident involving Hostler Helper Meeks, the Carrier had to decide whether to accept as true the statements (at the investigation) of two police officers reporting on Mr. Meeks' account of the incident given to them shortly after it happened, or his statement given at the investigation almost two weeks later. It also had to weigh the statement of the Claimant concerning this incident. There is no conflict in the testimony up to the point that the Claimant was on the Carrier's property while he was off duty and struck Hostler Helper Meeks who was on duty. The only conflict is in the attitude which which he struck this employe who was on duty; there is no denial that he did strike him.

If the claimant's statement that he was only playing with Mr. Meeks is true, he was guilty of violation of General Rule "J" of the Safety Rules of the Transportation Department, reading as follows:

"Wrestling, fighting, scuffling, throwing of objects, practical joking or similar practices are positively prohibited on company premises."

Plaintiff's Exhibit No. 9 at Oral Hearing

If he struck Mr. Meeks maliciously, he is also guilty of violation of General Rule "G-4" of Rules of the Transportation Department, reading as follows:

> "No person who is vicious, profane or uncivil in deportment shall be employed or continued in the service."

It is not necessary to decide whether the Claimant had malice in his heart when he struck Mr. Meeks to know that his actions were inexcusable and in violation of the Carrier's rules. However, if he and Mr. Meeks were only playing and this playing was a usual practice, as claimed by the Claimant, why did Mr. Meeks select this particular time to complain to the police officers about the incident?

In the incident involving Switchman Beckert, the testimony of all employes present, including the Claimant, is without conflict up to the point when he came onto the Carrier's property while off duty and questioned an employe on the property and performing his duty about his work record during a strike in the previous year. There is testimony by the switchtender to the effect that he was struck by the Claimant when his answer was not to the claimant's liking. There is testimony of two police officers that the switchtender made a report to the Ass't. Trainmaster immediately after the incident and gave them information similar to his testimony given at the investigation. The Claimant denied that he struck the switchtender but did not dispute the remainder of the switchtender's account of their meeting. He repeated the remark attributed to Mr. Maddox, the Hostler, by the police when they asked him if the Claimant had struck the switchtender, Mr. Beckert. He said:

> "Mr. Maddox said I don't see any marks on him, do you?" and they said, "No."

Plaintiff's Exhibit No. 9 at Oral Hearing

The Claimant said in his statement that the Hostler, Mr. Maddox, would have stated at the investigation that he had not struck or struck at Mr. Beckert. However, according to the testimony of Police Sgt. Haynes, Mr. Maddox told him that he did not know Mr. Humphries and made an evasive answer about the incident.

While the Carrier must take into account the fact that Mr. Maddox was not present at the investigation, there would be no testimony possible that could refute the testimony of those who did make statements.

The Carrier submits that there was sufficient testimony adduced at the investigation to reasonably support its findings. Also, in electing to believe the testimony of Switchtender Beckert and the police officers, it did not abuse its discretion.

In this connection the Division's attention is invited to its following decisions:

> "While there was a difference of opinion shown in the investigation, there was sufficient testimony adduced to reasonably support the findings made by the inquiring officer. Under such circumstances this division may not substitute its opinion for the judgment of the management." (First Division Award 11728, Referee Lewis).
>
> "Where a switchman was charged for threatening a conductor with bodily harm, claim for reinstatement and pay for time lost was denied. 'We have hear (sic) a record of a positive statement and an emphatic denial. As the trier of the facts, we might have believed the claimant instead of the conductor, but on the record before us there exists no basis for holding the carrier abused its discretion when it elected to believe the conductor and not the claimant.'" (Award 14690).

Plaintiff's Exhibit No. 9 at Oral Hearing

After arriving at the conclusion that the Claimant was guilty and subject to dismissal, the examination of his record, attached as Carrier's Exhibit "BB", could not cause the Carrier to take any other action. In fact, it might explain why Hostler Helper Meeks was less emphatic in his testimony at the investigation than he was in in his complaint to the police officers shortly after the occurrence.

We submit that the action of the Carrier in removing this man from the service should not be disturbed.

All data in support of the Carrier's position in connection with this claim have been presented to the duly authorized representatives of the employe.

Oral hearing is not desired by the carrier, unless requested by the employes.

Respectfully submitted,

(s) W. S. Scholl,
Director of Personnel.

cc: Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen
and Enginemen,
Louisville, Kentucky.

Statement of E. Haynes, Sergeant of Police

CARRIER'S EXHIBIT "AA".

Statement of E. Haynes, Sergeant of Police,
Taken at Louisville, Ky., Feb. 28th, 1956.

Questions by Mr. E. E. Sullivan, Asst. Superintendent.

Q. Mr. Haynes, we are investigating the case of Fireman B. G. Humphries charged with assaulting two employes who were on duty on company premises Feb. 15, 1956, and violation of Rule 7-4. Please tell us what you can in connection with this occurrence.

A. There is not much I can tell, all I know is what they told me. I believe along about 7:20 PM, Feb. 15th, 1956, Asst. Trainmaster Mr. J. Burke called me and told me to go to 10th & Kentucky Sts. the switchtender's shanty that somebody had struck the switchtender in the face. Patrolman Page and myself went to 10th & Kentucky, we located this boy, I can't recall his name, I believe it was Beckert, and he said he was up in the Roundhouse to see Mr. Maddox who was a hostler and asked him where he wanted an engine, and said there was another man in there and said this man asked him if he worked during the strike and he told him he did, then this man hit him. That is about all I know about it. I asked him who the man was and he said his name was Humphries. Then about 9:00 PM Mr. Meeks, I think he is a hostler-helper, he came into the station and his eye was red and I asked him what was the matter with it and he said Mr. Humphries struck him in the eye, said the next time he did it that he was going to kill him. I told him then about having a complaint on Mr. Humphries hitting this switchtender, Mr. Beckert, or something like that. I asked Mr. Meeks if there was an investigation called would he testify to what he had told me and he said he would, that is about all.

Statement of E. Haynes, Sergeant of Police

Q. Did either Meeks or Beckert give the occupation of Humphries?

A. They both told me that he was a fireman for the L&N.

Q. Do you know whether or not Fireman Humphries was on duty?

A. I do not.

Q. Did you see both Beckert and Meeks and can you say how badly they were injured?

A. Mr. Meeks' eye, that is his right eye, was red and swollen a little not too much, and the only thing that I could see with Mr. Beckert was he had a little blood in the corner of his mouth like he might have cut it.

Q. Do you recall exactly what each Meeks and Beckert told you?

A. I don't remember exactly word for word what each told me. I have a copy of the report I made on the case. This is the report just as I wrote it. Quote—Mr. Meeks told me and Patrolman Coche that Mr. B. G. Humphries, who is a fireman for the L&N, struck him in the eye. He said that Mr. Humphries was in the 10th Street Roundhouse at the time he hit him and Mr. Humphries was drunk. I asked Meeks if he would testify in an investigation concerning this matter, he said that he would and further stated that the next time Humphries hit him he was going to kill him. Mr. Beckert told us that an L&N Fireman by the name of B. G. Humphries was the one that struck him. He said he went to the 10th St. Roundhouse to get some information from Mr. C. B. Maddox and that Mr. Humphries was in the Roundhouse and asked him if he worked during the strike and when he told him that he did, Mr. Humphries struck him in the mouth with his fist.

Q. Do you know whether or not Meeks and Beckert were on duty and on company property at the time?

Statement of E. Haynes, Sergeant of Police

A. Yes they were on duty and on company property.

Mr. J. A. Parrish:

Q. Did you see Mr. Humphries at any time during that evening?

A. No, I would not know him if I saw him.

Q. Was there anyone in the 10th St. Roundhouse when you were there besides Meeks and Beckert and also Mr. Maddox?

A. Mr. Meeks was not in the Roundhouse when I was talking to him, he was in Union Station. Mr. Beckert and Mr. Maddox were in the Roundhouse when I was talking to them and there were also some other men but I did not know them.

Q. You don't recognize Mr. Humphries now as the man who was in there then?

A. No, I don't know who it was who was in there, he walked out just about the time we went in. I asked Mr. Maddox about Mr. Humphries and he said he did not know Mr. Humphries. I also asked him who the gentlemen was who just went out and he said he did not know him either.

Mr. J. Paschall:

Q. Did you see Mr. Humphries strike either Beckert or Meeks?

A. No sir.

Q. Then all the evidence you have is their word for it?

A. Yes sir.

Q. You stated that Mr. Maddox was in the Roundhouse at the time you were there, did he tell you that he saw Humphries strike either one of them?

A. Mr. Maddox told me that he did not see any licks struck.

Mr. E. E. Sullivan:

Q. Is there anything further you wish to add to your statement?

A. No sir.

Question by Mr. B. G. Humphries, Fireman:

Q. Did Mr. Maddox ask you if Beckert had any marks on him?

A. Mr. Maddox said you don't see the man with a broke nose or any marks on him and I told him No, all I see is a little blood in the corner of his mouth.

Mr. E. E. Sullivan:

Q. Do you have anything further to add to your statement?

A. No sir.

Witnesses present signify no further questions to ask the witness.

I have read the above statement and acknowledge it as correct.

(s) E. Haynes,
Sergeant of Police.

Witnesses:
(s) Jake Paschall
(s) B. G. Humphries
(s) J. A. Parrish
(s) E. E. Sullivan

Statement of Patrolman W. B. Page, taken at Louisville, Ky., Feb. 28th, 1956.

Questions by Mr. E. E. Sullivan, Asst. Superintendent:

Q. Mr. Page, we are investigating the case of Fireman B. G. Humphries charged with assaulting two employes who were on duty on company premises Feb. 15, 1956, and violation of Rule G-4. Please tell us what you can in connection with this occurrence.

A. I am afraid that I can't tell you too much other than hearsay. We got a call about 7:20 PM as I remember

Statement of Patrolman W. B. Page

on the night of Feb. 15th, from Trainmaster Burke. Sergeant Haynes and I went to Kentucky Street to investigate this matter and we talked to a man by the name of Beckert, a switchtender there. He claimed that he went down to 10th St. Roundhouse for some information in regard to movement of an engine and while he was in there a fellow Humphries made some remark to him, it was not clear to me as to just what the remark was, and Beckert gave Humphries some answer and with that he claimed Humphries took a swing at him, and he also stated that he did not do anything to defend himself, just left and went on out. Mr. Haynes and I took Switchman Beckert back to the roundhouse to try to get him to identify the person he claimed had hit him but after we went there he didn't identify this fellow and we talked with the Hostler, I believe his name was Maddox. We asked Maddox if he had seen what had went on and what had happened and he stated that he had not seen anything. We also asked him if he knew a Fireman by the name of Humphries and he said that he did not and we asked him a few more questions and he was not very cooperative and his last statement was that if we wanted any more information that he would have to say it in front of the investigation. That is just about it.

Q. Did Switchtender Beckert show any evidence of any injury?

A. To the best of my knowledge he did not have any scars, or any blood, I will not say that he was not hit but he did not have any scars.

Q. Do you know whether or not Beckert was on duty?

A. Yes he was on duty at the time.

Q. Do you have any information as to some other person being struck on this same evening?

A. Not directly, no. I heard some hearsay later that night.

Statement of Patrolman W. B. Page

All witnesses present signify no questions to ask the witness.

Q. Do you have anything further to add to your statement.

A. No sir.

I have read the above statement and acknowledge it as correct.

(s) W. B. Page,
Patrolman.

Witnesses:
(s) Jake Paschall
(s) B. G. Humphries
(s) J. A. Parrish
(s) E. E. Sullivan

Statement of Patrolman J. O. Coche, taken at Louisville, Ky., Feb. 28th, 1956.

Questions by Mr. E. E. Sullivan, Asst. Superintendent:

Q. Mr. Coche, we are investigating the case of Fireman B. G. Humphries charged with assaulting two employes who were on duty on company premises Feb. 15, 1956, and violation of Rule G-4. Please tell us what you can in connection with this occurrence.

A. The only thing I know in connection with that is about 9:00 PM, Feb. 15, 1956, I was sitting in the Union Station with Sergeant Haynes and Mr. Meeks came in and was rubbing his eye. It was a little red and somewhat swollen and Mr. Haynes asked him what was wrong. Mr. Meeks said Mr. Humphries had hit him in the eye and said that Humphries was in the Roundhouse drunk and said I just want to tell you that if he hits me again I will kill him. Mr. Haynes asked Mr. Meeks if he would state that in an investigation and he said, Yes, I will. That is all that took place then.

Statement of Patrolman J. O. Coche

Q. Who is Meeks?

A. I don't know his occupation.

Q. Did Meeks identify Humphries as to his occupation?

A. No he did not. Haynes and Meeks knew each other and I am new here.

Mr. J. Paschall:

Q. Do you know Mr. Humphries?

A. No sir.

Q. Then you did not see him on Feb. 15th?

A. I did not see Mr. Humphries.

All witnesses present signify no further questions to ask the witness.

Q. Do you have anything further to add to your statement?

A. No sir.

I have read the above and acknowledge it as correct.

(s) J. O. Coche,
Patrolman.

Witnesses:
(s) Jake Paschall
(s) B. G. Humphries
(s) J. A. Parrish
(s) E. E. Sullivan

Statement of F. R. Meeks, Hostler Helper, taken at Louisville, Ky., Feb. 28th, 1956.

Questions by Mr. E. E. Sullivan, Asst. Superintendent:

Q. Mr. Meeks, we are investigating the case of Fireman B. G. Humphries charged with assaulting two employes who were on duty on company premises, Feb. 15, 1956, and violation of Rule G-4. Please tell us what you can in connection with this occurrence.

Statement of F. R. Meeks, Hostler Helper

A. I was not even in here I don't know a thing about it.

Q. Did you see Fireman Humphries on the evening of Feb. 15, 1956?

A. Yes I saw him at South Louisville and not at 10th Street.

Q. About what time did you see him at South Louisville?

A. About 8:00 PM.

Q. Did you have any conversation with him?

A. Yes, I always talk to him.

Q. Did he molest you in any way?

A. No. He is always smacking at me because I was a fighter in my younger days and he was too.

Q. In smacking at you did he cause any injury of any kind?

A. Just stung me in the right eye a little bit.

Q. All this playing in was indulged in at South Louisville?

A. Yes sir.

Q. Was Fireman Humphries on duty?

A. No sir.

Q. Were you on duty and what position were you filling?

A. I was on duty as Hostler Helper, working 2:30 PM to 10:30 PM.

Q. Did you come to Union Station any time during that period?

A. Yes, we bring passenger engines in to 10th St.

Q. Did you have any conversation with Sgt. of Police Haynes and Patrolman Coche at Union Station on that date?

A. Yes sir.

Q. What was the conversation?

Statement of F. R. Meeks, Hostler Helper

A. He asked me about my eye and I told him Humphries hit me with his finger.

Mr. J. A. Parrish:

Q. Meeks, did you see Fireman Humphries around 10th St. Roundhouse at any time on Feb. 15th, 1956?

A. No sir.

Q. Did you see him in the station at any time while you were in there talking to Sgt. Haynes?

A. No sir.

Q. Where did you see Mr. Humprries at South Louisville Roundhouse?

A. In the caller's office.

Q. Was that the time that you were hit in the eye by Mr. Humphries?

A. Yes sir.

All witnesses present signify no further questions to ask the witness.

I have read the above statement and acknowledge it as correct.

(s) F. R. Meeks,
Hostler Helper.

Witnesses:
(s) Jake Paschall
(s) B. G. Humphries
(s) J. A. Parrish
(s) E. E. Sullivan

Statement of Switchtender A. S. Beckert taken at Louisville, Ky., Feb. 28th, 1956.

Questions by Mr. E. E. Sullivan, Asst. Superintendent.

Q. Mr. Beckert, we are investigating the case of Fireman B. G. Humphries charged with assaulting two em-

ployes who were on duty on company premises Feb. 15, 1956, and violation of Rule G-4. Please tell us what you can in connection with this occurrence.

A. I went up to the Roundhouse to see the Holster there and he was in the back room eating his supper and I started talking to him and Humphries butted in and asked me what I was doing with my hair all messed up. I told him I had been riding the engines out there in the wind and he asked me what I was doing swinging my lantern around and I told him I was trying to do my work. Then he asked me how long I had been around here and I said about a year. He said you are not one of those Scabs, are you? I said yes, the last two weeks of the strike. He looked at me real funny and lunged towards me and hit me up side the head. I walked out and he followed me and walked outside the building and he followed me and I went on up to Kentucky Street and called the Trainmaster at South Louisville, and he told me he would send the police out there.

Q. Are you acquainted with Fireman Humphries?

A. No sir, that is the first time I ever saw him.

Q. Did you give him any reason to strike you?

A. No sir, just answered his questions when he asked me.

Q. Did you strike back at him?

A. No sir I walked out the door.

Q. How often were you struck?

A. Once.

Q. Were you hurt?

A. I had a little knot up beside my head.

Q. Were you knocked down?

A. No sir.

Q. Was it necessary to receive medical attention?

A. No sir.

Statement of A. S. Beckert, Switchtender

Q. Do you know whether or not Fireman Humphries was on duty?

A. No, I do not, I imagine he was not on duty.

Q. Was any profanity used in the questions of you?

A. No sir.

Mr. J. A. Parrish, M.M.

Q. Did you know at the time you were talking to Mr. Humphries that he was a fireman?

A. No sir.

Q. Did you see Mr. Humphries any more that evening atfer you left him at 10th St. Roundhouse?

A. Yes, I got the engineer off the yard engine to walk over to 10th St. Roundhouse with me and he is the one who told me who he was. Humphries walked around the Roundhouse and just looked at us.

Q. What time was this, was it before or after you were struck?

A. It was after I was struck.

Q. Had Mr. Humphries left the Roundhouse then or was he still there?

A. He was still there outside talking to the hostlers that were fueling the engines.

Q. Did he offer to molest you any more at that time?

A. No sir.

Q. Have you ever had trouble with Mr. Humphries before this time?

A. No, that was the first time and only time.

Mr. J. Paschall:

Q. You said he only struck you once on the side of the head?

A. Yes sir.

Q. Then he did not strike you in the mouth?

A. No sir.

Statement of A. S. Beckert, Switchtender

Mr. E. E. Sullivan, Asst. Supt.

Q. About what time did you ask the engineer on the yard engine to go with you and identify him?

A. About 7:10 or 7:15 PM.

Q. How long was this after you had been struck?

A. About 20 minutes.

Q. Did you continue working or was it necessary to lay off account this?

A. I continued working.

Q. What position were you filling on the night of Feb. 15, 1956?

A. I was working as switchtender at Kentucky St. 3:30 PM to 11:30 PM.

All present signify no questions to ask the witness.

I have read the above statement and acknowledge it as correct.

(s) A. F. Beckert,
Switchtender.

Witnesses:

(s) Jake Paschall
(s) B. G. Humphries
(s) J. A. Parrish
(s) E. E. Sullivan

Case of: Fireman B. G. Humphries charged with assaulting two employes who were on duty on company premises Feb. 15, 1956, and violation of Rule G-4.

Questioned by?
Mr. E. E. Sullivan, Asst. Supt.
Date Feb. 28, 1956
At Louisville, Ky.

Q. Your Name? Age? Residence?

A. B. G. Humphries. 44 Louisville, Ky.

Q. Present Occupation?

A. Fireman.

Statement of B. G. Humphries, Fireman

Q. How long have you been employed in this Company's service, in what capacities and how long a time in each capacity?

A. 12 years as a Fireman.

Q. Have you been in the service of other roads? If so, state particulars and why you left the service in each instance?

A. Worked for the Southern Pacific about 3 months when cut off by L&N.

Q. Have you been examined on the rules of the Operating Department? If so, when, by whom and for what position?

A. Yes sir, in 1955 by Mr. G. M. Breuner, ATM for position as Fireman.

Q. This investigation, as you have been advised, covers case as shown above. What position were you filling at time of occurrence?

A. I was not on duty.

Q. How long had you been on duty at the time of this occurrence and how much rest did you have prior to going on duty?

A. On Duty—Not on duty. Off duty—

Q. Do you have a representative present?

A. Mr. J. Paschall, General Chairman, B. of L.F. & E.

Q. Do you desire to be represented?

A. Yes sir, by Mr. Paschall.

Q. Please give us what information you can in this case.

A. I was out at the South Louisville Roundhouse and S. McMillen, Engr., came in off his run, he lives at Lebanon Junction, and asked me if I would drive him down to catch the train to go home. While I was down here I walked in the 10th St. Roundhouse and I was talking to Hostler Maddox when this man Beckert came in and I just made the remark to him as to how long he had been working here

and he said about a year, and I asked him if he worked any during the strike. He said yes, he worked about two weeks, and he turned around and walked out. I did not hit him or hit at him. That is about all except what Mr. Maddox told me later on 2 or 3 days later, that the police had come down there and bronght this man with them and told Maddox that I had hit this man. Mr. Maddox said I don't see any marks on him, do you? and they said No. That is about all there is to it.

Q. Did you have any trouble with Hostler Helper Meeks on this same night?

A. Not any trouble. Just like Meeks said we are always playing around slapping around at each other. The first thing I knew about me touching him in the eye was a day or two later when Meeks told me about it himself.

Q. You definitely say that you did not strike or strike at Switchtender Beckert?

A. Yes sir, and if Mr. Maddox was here he would tell you the same thing. I tried to get hold of Mr. Maddox to have him here but he must be at Paris as he is cut off.

Mr. J. A. Parrish, M.M.:

Q. Where did you see Hostler Helper Meeks on that night?

A. At South Louisville Roundhouse in the Caller's office.

Q. About what time was that?

A. It was about 8:00 PM, after I took McMillen to 10th St.

Q. Is that the place where you and Meeks were slapping around at one another?

A. Yes sir.

Q. Did you see Holster Helper Meeks around 10th St. Roundhouse at any time that evening?

A. No sir.

Statement of B. G. Humphries, Fireman

Q. About how long did you stay around 10th St. Roundhouse?

A. About 15 or 20 minutes.

Q. Do you make a practice of playing with Mr. Meeks as you did on this night?

A. It is not a practice but we have played around 3 or 4 different times.

Q. Did you have an argument with Mr. Meeks at South Louisville on that night?

A. No sir. Mr. Meeks has always been a friend of mine and never have had an argument with him.

Statement of Mr. J. Paschall:

We want that no action be taken in this case due to the fact that the only existing eye witness to either of these charges is not here. This investigation was postponed at our request by Mr. Sullivan in order that Holster Maddox might testify but he is out of the city due to the death of his wife and neither we or the officers of the railroad have been able to locate him. He is the only one apparently able to give any direct testimony whatever. The investigation was reset for today, Feb. 28th, after conversation between Mr. Sullivan and myself in which he told me that he had to leave the city today and he did not wish to postpone the investigation until after his trip. I stated that we would have to hold the investigation and in the meantime we would try to locate Mr. Maddox, however, we have been unable to do so.

Mr. E. E. Sullivan:

Q. Is there anything further you wish to add to your statement?

A. No sir.

Q. Do you consider that this investigation has been conducted in a fair and impartial manner satisfactory to you?

Statement of B. G. Humphries, Fireman

A. Yes sir.

I have read the above statement and acknowledge it as correct.

(s) B. G. Humphries,
Fireman.

Witnesses:
(s) Jake Paschall
(s) J. A. Parrish
(s) E. E. Sullivan

CARRIER'S EXHIBIT "BB".

Service and Discipline Record of—

B. G. Humphries, Fireman
Louisville (M.S. 1st) Divn.
Employed as locomotive fireman April 5, 1944

Suspensions:

4/19/46, 20 days—hostler, failing to control movement of engine which went into turntable pit.
4/ 1/47, Called in office about getting left.
8/11/48, Reported by YMCA Management for getting drunk, beat up a conductor and threatened others, No action taken.
10/11/48, Beat up an engineer who had to lay off at Bowling Green. Complaint made about his general attitude (quarrelsome) and drinking.
4/13/50, Called to the office about smoke violation.
5/22/50, Called to the office about smoke violation.
12/ 9/50, Violation of Rule 1010. Engr. & fireman left engine at same time.
3/ 4/52, Notified to report to Ass't Supt. James, about his activities.
8/ /55, Called in to office and reprimanded account causing disturbance in the Roundhouse.

PLAINTIFF'S EXHIBIT No. 11 AT ORAL HEARING.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville, Kentucky

September 23, 1958.

L-306-9

Mr. J. M. MacLeod,
Executive Secretary, First Division,
National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

First Division Award 18720—
Request for Interpretation.

The above award ordered Fireman B. G. Humphries reinstated to this carrier's service with his seniority rights unimpaired and "with pay for time lost as the rule is construed on the property."

In Compliance with the Award Fireman Humphries has been reinstated and is now actively at work as fireman. A dispute exists, however, between the parties as to the proper application of the award in connection with determining amount due Humphries for time lost as a result of his dismissal. The rule involved is Article 31 (f) of the firemen's agreement, reading as follows:

"If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken.

Note. This Section applies only where a fireman is held out of the service or taken out of the service on

account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation."

The Award orders Humphries paid as the above rule is construed on the property.

The carrier has always construed the discipline rule to mean that when an employe is restored to the service with pay for time lost, he is to be reimbursed the amount he would have earned had he remained in railroad service, less any time he may have earned in outside employment.

In compliance with the above understanding of the rule, carrier called on Fireman Humphries to submit a statement showing his earnings in outside employment during the time he was out of service as a fireman. This he has refused to do, the firemen's organization taking the following position in letter addressed to the Director of Personnel by the General Chairman, under date of May 20, 1958:

> "Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board. In this conection your attention is directed to Awards 5248, 16245, 17030 and 17644 of the First Division, National Railroad Adjustment Board, in which earnings in outside employment were not deducted from the time lost payment, and there are many other Awards. In these cases payments were made for full time lost without any deduction for earnings in outside employment. Accordingly, we will expect Mr. Humphries to be paid for full time lost."

By correspondence and in conferences the carrier has explained to the organization that contrary to the position

Plaintiff's Exhibit No. 11 at Oral Hearing

it is now taking, the carrier has always given consideration to outside earnings a man, who is to be reinstated with pay, may have had while out of L & N service. Furthermore, that no discipline rule under any agreement this carrier has with its various classes of employes, including Art. 31 of the firemen's agreement, has ever been construed on the property as prohibiting deductions of outside earnings.

The four awards referred to by the employes in above quoted letter support the position of the carrier rather than the position of the employes in that outside earnings were considered by management in each of the four cases.

Award 5248 involved Conductor J. B. Cooper, who had no outside earnings.

Award 16245 involved Conductor T. J. Holbrooks, who had no outside earnings. Furthermore, the settlement in that case included his retirement from active service.

Award 17030 involved Fireman T. Y. Alston, who had no outside earnings and so certified in his letter of June 21, 1955, addressed to the Master Mechanic, reading:

> "This is to advise that I have made no money in outside employment since my dismissal in February 1953, as I have been unemployed since that time."

This information was passed on to General Chairman Paschall, of the firemen's organization, by the Director of Personnel, in letter dated August 26, 1955, reading in part as follows:

> "Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board, which, of course, have to be deducted from the amount due him."

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This refutes the contention of the organization that outside earnings were not considered in this case, and it is significant that the general chairman did not at that time challenge the right of management to secure such information for Fireman Alston or take the position that the rule prohibited the carrier from considering outside employment in arriving at amount that may be due an employe when ordered restored and paid for all time lost under the terms of Article 31 of the firemen's agreement.

Award 17644 involved Yardman C. C. Neal. That Award certainly refutes the contention of the employes that outside employment has never been taken into consideration in the application of Article 31 on this property, that Article being substantially the same in the four agreements this carrier has with its engineers, firemen, conductors and trainmen. In that case we made the following statement to this Board in our submission, dated December 18, 1951:

> "If, despite the gravity of the offense committed by the claimant and despite the oft-repeated declaration by the First Division that the measure of discipline is not a matter for its consideration, and its numerous declarations that it will not substitute its judgment for that of the management in discipline cases, the Division should conclude that the claim involved herein should be sustained and the claimant paid for any time lost, then this Company without waiving its position as to the merits of this claim, submits that the Division should find and award that the claimant be paid only for time actually lost by reason of the discipline imposed, that is, for the days the claimant was available and stood for work in his class or craft, less any earnings from other employment. This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action

if the Company had knowledge that he had been employed during such period."

The Trainmen made their rebuttal to the carrier's submission in the Neal case on January 7, 1952. That rebuttal challenged numerous statements made by the carrier, but very significantly took no exception whatever to the above statement made by us concerning the matter of deduction of outside earnings.

When Yardman Neal was restored to service in compliance with Award 17644, carrier inquired of him concerning his outside earnings. He certified that he was only employed a part of the eighty seven days that he was out of L. & N. service. He further stated that in order to secure such part-time employment he had to move from Ravenna, Kentucky, to Cincinnati, Ohio, and then, of course, had to move back to Ravenna when restored to L. & N. service as yardman. On Mr. Neal's statement that the extra expense he was put to off-set the amount he earned, management considered he in effect had no outside employment and therefore paid him in full for the wages he lost while out of L. & N. service. Had Mr. Neal realized a net gain from his outside employment, management most certainly would have insisted upon deducting such earnings from the amount due him representing his lost time as a yardman.

In conference on the property concerning proper interpretation to be placed on Award 18720 in determining payment due Fireman Humphries as time lost, the firemen's organization took the position management is attempting to read something into the rule that is not there when we say the rule permits deductions of outside earnings. Then in the next breath they attempted to enlarge on the rule by saying it prohibits any consideration being given to time earned in outside employment in determining time lost

because of disciplinary action. Carrier submits there is no such prohibition in the rule. Furthermore, it is not necessary to enlarge on or change the rule in any way to arrive at the conclusion that outside earnings may be properly considered in determining time lost while out of L. & N. service. In support of this contention, attention is invited to this Board's Award 5862 in which the method to be employed in determining the amount of compensation to be paid was fully considered. In this Award the Division, speaking through Referee Fox, said:

> "Unquestionably if these cases were pending in a court of law, the claimants would, under proper limitations, be required to account for any money earned in other employment. This seems to be conceded by all the referees who have considered the question, and citation of authority of courts on the subject is not considered necessary. This established rule applies to every character of case when the breach of contract involving personal service is involved. There may have been the grossest of violation, attended by circumstances justifying punitive damages, and yet, whatever the ground for the damages assessed, there must be credited, as against compensatory damages, any money received by the plaintiff from other employments during the period covered by the breach and for which damages are allowed. The reason back of this rule is not difficult to find. It rests on the proposition that if there had been no breach of the contract the plaintiff would have earned a certain sum. If by reason of the breach he is deprived of any part of that sum, he is entitled to have the same paid as damages so that he might be made whole but if, during that period, he earns money from other sources a less sum is required to make him whole, and his damage is

lessened to that extent. A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires.

"We are unable to see why this legal principle should not be applied to the case before us. It may be said that we have here a plain provision of the contract providing for payment, in a certain way, for a specified violation, and that no mention is made of any deduction. This is not different from the ordinary contract of employment. Such a contract may or may not be for a specified time, but the compensation is either fixed by the contract or an agreement to pay a reasonable wage or salary is implied by law. Rarely is anything said about a breach, because none is contemplated; and rare indeed would be the instance where the parties discuss the minutia of the methods to be employed in compensating one party in cases of a breach. When the breach occurs the law steps in and prescribes the method of compensation in damages. Here we have a contract between the carrier and the employe. Under it the carrier undertakes to protect the employe in his right to work under certain rules of seniority. The carrier violates that agreement, the employe is not permitted to work at times when he had the right to do so and he suffered damage thereby to the extent of the days lost, or in the payments provided to be made. That is his claim for damage and so far he is on solid ground; but then comes the law which says to him: Your right to damage is clear, but when your contract was breached by the carrier it became your obligation to secure other employment, and if you did so, and received compensation therefor, you must credit the

amount received on your claim, because you are not damaged beyond the difference between what you would have received from the carrier and what you actually received from other sources during the same period. You are not entitled to receive compensation from two sources for the same day, unless the wage you actually received is less than you were entitled to receive from the carrier. We see nothing unsound in this position. Under it the carrier is made to comply with monetary terms of his agreement, the employe is saved from loss, and exact justice is meted out to the parties concerned. In the application of this principle liberality should be exercised in favor of the employe. He should not be held too strictly to his legal obligation to seek other employment. Practical considerations of residence and family conditions should be considered. But when an employe actually receives wages for work performed on the same dates he should have been permitted to work for the carrier, he is only entitled to the difference between the wages he should have received and those actually received. Of course, wages received, at times when his seniority did not entitle him to work for the carrier do not enter the picture, and should not be deducted.

"The Congress in its wisdom has seen fit to relieve employes of railway doing interstate business from the burden of resorting to the courts with attendant expense and delays, for the vindication of their contract rights, has extended this principle to other lines of industry; and has set up numerous boards and commissions of which this Division is one, to carry out its purposes in this regard. But there are many lines of industry in which it does not possess the power to act, or having the power has not chosen to exercise it. In such

cases the rules of law prevail, and as we have stated earnings must be credited against damage. We think the same standard should prevail in all cases, unless some particular contract sets up a different one. We do not believe the contract under consideration does so."

The legal principle referred to by this Board in the above Award has also been applied by the Courts in cases involving railroad claims. In fact, the discipline rule of the conductors' agreement on this property, materially the same as Article 31 of the firemen's agreement, has been interpreted by the Courts as permitting deductions for outside earnings. The case referred to involves the decision of the Court of Appeals in the case of *L. & N. R. Co.* v. *Wells*, decided March 3, 1942 (289 Ky. 700, 702-706). In that case the Court had the following to say with respect to plaintiff's claim for loss of earnings as a railroad conductor in connection with his allegation that he was unjustly dismissed in violation of Article 31 of the agreement.

"4. The plaintiff did not plead or prove that he had been unable to procure any employment during the six years and more since his alleged recovery or that he had not earned any money at all. When a contract for personal services has been wrongfully terminated by an employer, it is the duty of the employe to minimize his damages by diligently seeking to find similar employment in the locality. He cannot sit by idly. He cannot recover more than the difference between the contract wages or salary and the amount he earned or could have earned with reasonable diligence. And on this element of a right of action for damages for breach of contract of employment, the burden is on the plaintiff to allege and prove that he exercised reasonable

diligence in the respect stated and his inability to earn anything, if such was the case, or what he earned during the period. John C. Lewis Company v. Scott, 95 Ky. 484, 487, 23 S. W. 192, 44 Am. St. Rep. 251; Abrams v. Jackson County Board of Education, 230 Ky. 151, 18 S. W. (2d) 1000; Torson Construction Company v. Grant, 251 Ky. 800, 66 S. W. (2d) 79. There was neither pleading nor proof of this fact, so even had the other fatal defects not existed, he would have been entitled to recover only nominal damages. Newport Dairy v. Shackelford, 261 Ky. 754, 88 S. W. 2d 940."

Carrier submits that Article 31 of the firemen's agreement on this property has always been properly considered and construed by management as permitting deduction of outside earnings in determining amount due an employe restored to the service with pay for time lost.

During conferences on the property, the organization contended that this Board did not have before it for consideration the matter of outside earnings in the Humphries' case. Carrier does not agree. In the first place, we understand the subject was specifically before the Board as a brief on the matter of deduction of outside earnings was presented to the Referee by a carrier member. Secondly, even if the matter had not specifically been raised, whenever a man is restored to service with pay the question of deduction of outside earnings automatically injects itself into the problem, whether it is mentioned in the record or not. And when a contract is violated, if that contract does not specifically prohibit deduction of outside earnings—which Article 31 of the firemen's agreement does not do—then under the well-established principles of Anglo-American law it is entirely proper for such deduction to be made. Thirdly, the very wording of the award leaves no room for reasonable doubt that the Board had the matter of outside

Plaintiff's Exhibit No. 11 at Oral Hearing

earnings for consideration, otherwise there would have been no basis for the Board ordering claimant paid "as the rule is construed on the property."

In view of the fact that the carrier and the firemen's organization can not agree on the meaning of your award, the Board is hereby requested to make an interpretation as to whether or not Award 18720 contemplates deduction of outside earnings in determining the amount of time lost due Fireman B. G. Humphries.

Respectfully submitted,

(s) W. S. Scholl,
Director of Personnel.

Copy: Mr. Jake Paschall, General Chairman,
Brotherhood of Locomotive Firemen and
Enginemen,
Louisville, Kentucky.

PLAINTIFF'S EXHIBIT No. 12 AT ORAL HEARING.

Radnor, Tenn., June 21, 1955

Mr. C. A. Ellner:

This is to advise that I have made no money in outside employment since my dismissal in February 1953, as I have been unemployed since that time.

(s) T. Y. Alston,
Yard Fireman.

ORDER.

This cause having come on for hearing on May 18, 1959 on the motion of plaintiff for judgment on the pleadings and for final trial, and all parties having announced ready, and the Court having announced that disposition of the motion for judgment on the pleadings would be passed until all the proof had been heard, thereupon, the plaintiff proceeded to present its evidence. The case not having been concluded at adjournment time, same was passed to this the 19th day of May, 1959. Upon the call of the case on May 19, 1959, counsel for the respective parties appeared and agreed in behalf of their respective clients that the taking of proof should be suspended, the further hearing of this case passed, and the temporary injunction heretofore granted continued in force until January 4, 1960, each of the parties hereto agreeing that it will promptly use its best efforts to secure an advancement by the National Railroad Adjustment Board, First Division, of the presently pending submission involving the claim of B. G. Humphries, to the end that it may be disposed of by that Board on or before January 4, 1960; and it appearing to the Court that under all the circumstances in this case it is highly desirable and to the best interests of the parties hereto, and in the interest of Justice, that the National Railroad Adjustment Board may dispose of the present submission in respect of the claim of B. G. Humphries on or before January 4, 1960.

NOW THEREFORE, in accordance with the agreement of the parties, the trial of this cause is suspended until January 4, 1960, at which time the parties hereto shall appear in this Court at 10:00 A. M. for other and further proceedings as may appear to this Court proper at that time, the temporary injunction heretofore issued and the injunction bond to continue in force until further order of this Court.

Order

This 19th day of May, 1959.

(s) Henry L. Brooks,
Judge.

The above order agreed to
this May 19, 1959.

(s) John P. Sandidge,
(s) H. G. Breetz,
Counsel for Plaintiff.
(s) Chas. I. Dawson,
Counsel for Defendants.

NOTICE—MOTION—ORDER.

To: Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Defendants.

Please take notice that on February 19, 1960, at 2:00 P. M., the plaintiff, Louisville and Nashville Railroad Company, will present the attached Motion, Order and Amendment to the Complaint to the Court in the above Court Room.

CERTIFICATE.

This is to certify that a copy of the Amendment to the Complaint was delivered to Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Defendants, on December 21, 1959, and this is further to certify that a copy of this Notice, Motion and Order was delivered to Charles I. Dawson and Robert S. Dorsey at the same address on December 23, 1959.

MOTION.

Comes the plaintiff and moves the Court to file in the above cause its Amendment to the Complaint, a copy of which is attached hereto[1] for the purpose of clarifying the allegations of the Complaint.

(s) John P. Sandidge,
Woodward, Hobson & Fulton,
1803 Kentucky Home Life Building,
Louisville 2, Kentucky,
Attorneys for Plaintiff.

NOTICE AND RESPONSE.

To: Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Defendants.

Please take notice that on Feb. 19, 1960, at 2:00 P. M., plaintiff, Louisville and Nashville Railroad Company, will bring on for hearing the motion of the defendants to dissolve the temporary injunction and will object to said motion on the ground that it should be overruled.

CERTIFICATE.

This is to certify that a copy of this Notice and Response was delivered to Charles I. Dawson and Robert S. Dorsey, 1700 Kentucky Home Life Building, Louisville, Kentucky, Attorneys for Defendants, on December 23, 1959.

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[1]The Amendment to the Complaint is printed in the Appendix of Defendants-Appellants, pp. 30a-34a.

RESPONSE.

In opposition to the defendants' motion the plaintiff states as follows:

(1) The Exhibit A filed with the motion of the defendants is not a complete record of the opinion of all of the members of the Board. Attached hereto and made a part hereof and filed herewith is the dissent of the carrier members to Award No. 19363—Docket 36463. (Exhibit A)

(2) The Order of the First Division of the National Railroad Adjustment Board, dated December 9, 1959, does not dispose of all of the issues presented in this case. The issue is still present as to whether or not the defendant unions may strike to enforce an award under the provisions of the Railway Labor Act. It is the position of the plaintiff Railroad that they may not so strike. Reference is made to the arguments and authorities cited in the attached trial brief entitled Memorandum on Behalf of Louisville and Nashville Railroad Company, Pages 7 through 13.

(3) The issue remains that there is no pending dispute between the Louisville and Nashville Railroad Company and the Brotherhood of Locomotive Engineers, Order of Railway Conductors and Trainmen, and Brotherhood of Railroad Trainmen concerning this matter under their contracts, and no dispute has been processed by them in accordance with the provisions of the Railway Labor Act, 45 U.S.C.A. 152, Sixth. These unions have no right to strike or interfere in matters pertaining to the application and interpretation of the collective bargaining agreement between the Railroad and the Brotherhood of Locomotive Firemen and Enginemen. In support thereof see the argument contained on Pages 5, 6 and 7 of the Memorandum on Behalf of Louisville and Nashville Railroad Company attached hereto.

Notice and Response

(4) The Norris-LaGuardia Act has no application in this matter as has been specifically held by the Supreme Court of the United States in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Company*, 353 U. S. 30, 40, 1 L. Ed. 2d 622, 629, 77 S. Ct. 635, and *Louisville & Nashville Railroad Company* v. *Brown*, 252 F. 2d 149, 157 (C. A. 5th), cert. denied 356 U. S. 949, 78 S. Ct. 913.

(5) On December 21, 1959, plaintiff served on defendants' counsel a copy of its Amendment to the Complaint. The Amendment to the Complaint has been tendered to the Court and a motion has been made for permission to file same. The Court should permit this Amendment to be filed and require the defendants to answer before ruling upon the motion of the defendants to dissolve the temporary injunction.

(6) The motion of the defendants to dissolve should be overruled because of failure to comply with Rule 5 of the Rules of the United States District Court for the Western District of Kentucky at Louisville in that no memorandum was filed in support of sustaining said motion.

H. G. Breetz,
Louisville and Nashville Office Building,
908 West Broadway,
Louisville, Kentucky,

John P. Sandidge,
Woodward, Hobson & Fulton,
1805 Kentucky Home Life Building,
Louisville, Kentucky,
Attorneys for Louisville and Nashville Railroad Company.

EXHIBIT A. TO PLAINTIFF'S RESPONSE.

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division

Dissent On:
Award 19363
Docket 36463

Parties to Dispute } Louisville and Nashville Railroad Company
Brotherhood of Locomotive Firemen and Enginemen

DISSENT OF CARRIER MEMBERS.

This award is an evasion of the plain duty of this First Division of the National Railroad Adjustment Board to decide a dispute squarely before it as a consequence of a prior evasion to decide the same issue by its so-called interpretation of Award No. 18720.

As ex parte petitioner in the original case, the carrier stated the claim in the language of its presentation by the Brotherhood of Locomotive Firemen and Enginemen, for the reinstatement to carrier's service, with pay for time lost, of one B. G. Humphries, a locomotive fireman. The B. of L. F. & E., respondent, in support of its demand for the reinstatement of Humphries, relied on Article 31, "Board of Inquiry and Discipline", of the controlling agreement, in its entirety, Paragraphs (a) to (f), inclusive. By Paragraph (f):

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Respondent declared that it was "the position of the employees that Fireman Humphries was arbitrarily and capriciously dismissed from the service in violation of both

the Firemen's Agreement, Rule Article 31, and th Carrier's Operating Rules." The interpretation and application of Article 31 was, therefore, squarely before the Division in deciding the dispute.

Award No. 18720, prepared by Referee Stone, as adopted by his vote with those of the labor members, held that the investigation, resulting in Humphries discharge, did not fulfill the requirements of Article 31, and sustained his claim for reinstatement "with pay for time lost as the rule is construed on the property."

Differences then arose between the management and the General Chairman as to how the rule was construed on the property.

The carrier then requested an interpretation of the award. That request was disposed of by a so-called interpretation holding, in part, as stated in Award No. 19363.

Manifestly, the "dispute" as to the construction of the rule "on the property" could not have been made a part of carrier's ex parte petition in the original case since it was only generated by Award No. 18720.

Being thus invited, by the interpretation, to submit the "new issue", the carrier did so by its ex parte submission of January 23, 1959, only to be met by another evasion of the plain duty to decide "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." (The Railway Labor Act, Sec. 3, First, (i)), by a dismissal of the case, on the insupportable ground that the case presents a split cause of action and is res judicata. The findings in Award No. 19363 offer no logical basis for classifying the issue presented in this case as a split cause of action, or as one that has been adjudicated.

Exhibit A to Plaintiff's Response

There has never been any decision as to how "the rule is construed on the property" which was the gravamen of the issue raised by Award 18720, and submitted to this Division for decision. It cannot represent a split cause of action unless it was a dispute existing in relation to the Brotherhood's demand for Humphries' reinstatement to service of the carrier at the time carrier submitted that demand to the Division by petition dated June 13, 1957.

Respondent's advocate on the Division, urging the dismissal of this case on the ground cited in the award, relied on an award, announcing that "This Division definitely adopts the rule that controversies are not divisible and may not be brought to it separately as protest and claim for compensation." (Award No. 6334) In that case there was a joint submission of the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, with the carrier, of claims for members of a passenger train crew for compensation for more than six years, as a result of the reduction in the number of crews operating passenger trains between Spokane and Metaline Falls from two to one: Prior to November 29, 1930, two crews were employed each making fifteen trips per month, straight-away, between the terminals. On November 29, 1930, the runs were put on a turnaround basis, six days per week, operated by one crew. The same parties, jointly, had previously submitted to the Division a protest against "cancelling the passenger assignment between Spokane and Metaline Falls." There was no request for payment to any of the men affected. The protest was sustained by Award No. 1659, dated January 22, 1937. Later, there followed another joint submission by the same parties of the claim of one conductor, baggageman and brakeman, for monetary loss sustained between November 29, 1930, to February 16, 1937, when two crews were restored by application of Award

1659. The employees said there had never been "any question in the minds of the Chairman but what the carrier would allow the time as claimed if the protest was sustained * * *" showing conclusively that pay was an issue at the time the first case was filed with the Division. In rather extensive findings the referee enunciated the "rule" quoted above, but he, nevertheless, *sustained the claim for pay.* (Award 6334, dated January 13, 1942.)

There was also reference to Award 11682, issued September 17, 1947, which sustained claims for engineers working under the same conditions as two named engineers, awarded additional payment under Award No. 6266, of December 8, 1941. This award, 6266, dealt specifically with two named individuals and their assignments. Claims covered by Award 11682 were for other engineers, worked in the same manner, allegedly, in violation of the yard starting time rules. Award No. 11682 rejected the carrier's contention that this case constituted a split cause of action.

Thus, there was no award cited to the referee rejecting a claim presented to this Division on the grounds that it represented a split cause of action, or that the case was res judicata, nor has there ever before been such a clear evasion of our statutory duty.

(s) Geo. H. Dugan.

The undersigned concur:

(s) H. V. Bordwell
(s) E. Horsley
(s) H. W. Burtness
(s) H. V. Reeser

cc: All Members

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY,
AT LOUISVILLE.

Civil Action No. 3749.

Louisville & Nashville Railroad Company - Plaintiff,

vs.

Brotherhood of Locomotive Engineers, Et Al., Defendants.

TRANSCRIPT OF EXCERPTS FROM THE PROCEEDINGS.

Before Honorable Henry L. Brooks, United States District Judge, Western District of Kentucky, Louisville, Kentucky, on Thursday, August 18, 1960, without a jury.

APPEARANCES:

FOR THE PLAINTIFF
Mr. John P. Sandidge
and
Mr. Marvin Jones
Louisville, Kentucky

FOR THE DEFENDANTS
Mr. Charles I. Dawson
and
Mr. Ed Shaeffer
Louisville, Kentucky
Mr. V. C. Shuttleworth
Mr. Harold MacLaughlin
Mr. Russell Day
and
Mr. Wayland Sullivan
Cleveland, Ohio

PROCEEDINGS

Captioned case was called for a hearing before the Court on Thursday, August 18, 1960, at the hour of 9:30 A.M., and the following proceedings occurred:

By the Court: Gentlemen, we have on the docket the case of L & N versus Brotherhood of Locomotive Engineers, and others. And I believe we had completed about one day, or a good part of a day, of proof at the last hearing.

How long, Judge Dawson, will your proof require to complete?

Mr. Dawson: Your Honor, as presently advised, we have got some affidavits we want to file, and we want to—the witnesses are here if they want to cross-examine them on what they say on these affidavits.

Mr. Sandidge said his side would want to file some counteraffidavits, or at least affidavits, I don't know whether they'll be counter to ours or not. And he would like six days to do that and then we can complete the case afterwards.

Now, I have no objection to him having six days to file his counteraffidavits, but that won't stop the hearing this morning.

By the Court: Well, do you want to proceed without any formal statement?

Mr. Sandidge: May it please the Court, now I want to be sure we all understand one another here, Your Honor. There are some pending motions that are in front of you, too, that have been filed since our last hearing.

We filed in December a Motion to File an Amendment to our complaint. Judge Dawson has filed an answer. However, Your Honor has never signed the order permitting that complaint—that amendment to the complaint to be filed

By the Court: Well, that will be done and the amended complaint is now ordered filed.

Mr. Dawson: We've got a Motion to Dismiss the Injunction, too, the temporary injunction. That's what it's being heard on today, those two motions.

Mr. Sandidge: The Judge (Dawson) has made a motion to discharge the injunction, and we are prepared to present our proof.

However, yesterday Judge Dawson served me with the affidavits that he proposes to file. Therefore, Your Honor, I had no opportunity of course to file counteraffidavits. In addition, I was served this morning in the courtroom with two more affidavits, which I have not read.

Now, Your Honor, our thought about this was—of course I don't know what's in the last two affidavits; I know what's in the first two aff 'avits—that the issues in the case are considerably narrowed now, and though the rules require, as Your Honor is familiar, Rule 6, if you are going to rely on affidavits you will file those at least five days prior to the hearing, that we would not object to the filing of those affidavits if we were permitted to file counteraffidavits and that the matter be submitted in chief to Your Honor on the affidavits filed and the issues made up by the pleadings.

Now, that was what I thought we were talking about, and that's what we are agreeable to do.

Mr. Dawson: Well, don't—you don't want to put anything in the hearing this morning?

Mr. Sandidge: Well, as I understand, you were going to brief the case after the affidavits were filed.

Mr. Dawson: Well, I think the Court ought to hear us and get himself thoroughly oriented to what's involved. I think it at least takes a statement—

Mr. Sandidge (Interrupting): I'm perfectly willing to do that, Your Honor, and I think that's proper, that a state-

ment be made of the case and what the issues are now, and we are perfectly willing to go ahead. And there have been recent decisions since the time of the filing of the answer. Judge Dawson is not fooling me, and I'm not fooling him. I found that out this morning.

Now, that's our proposal, Your Honor. Otherwise, we would feel constrained to object to the affidavits.

Mr. Dawson: Well, it's immaterial whether we file the affidavits or not. We've got our witnesses here. If he prefers to put the witnesses on, we'll put them on.

Mr. Sandidge: If the Court please, I was served with the affidavits, and I was told they were going to be filed.

Mr. Dawson: They're going to be filed right now.

By the Court: Well, let the affidavits be filed. (To Mr. Sandidge) And I understand you want ten days from today—

Mr. Sandidge: He said six days, Your Honor. I want ten, though, or a week.

Mr. Dawson: Well, if you want ten days to file the affidavits, then we have to file briefs—I'm going to be tied up in some other litigation in preparing briefs, and I can't give it any time at all. My time is going to be tied up with the Gardner Will case in the next ten days, and I'm not going to object to this.

Mr. Sandidge: Your Honor, the affidavit served the other day by Mr. Paschall is seventeen pages long with some additions—I mean, some exhibits attached thereto.

By the Court: How much time do you want, Mr. Sandidge?

Mr. Sandidge: Your Honor, we believe we can finish it in a week—next Thursday.

By the Court: All right. One week. Now, I understand you want to make a statement at this time?

Mr. Dawson: I think it might be helpful to—

Mr. Sandidge (Interrupting): I think it would be well, Your Honor, to show our position.

By the Court: All right.

(At This Point There Followed Statements by Mr. Dawson and Mr. Sandidge in Behalf of Their Respective parties, After Which the Following Proceedings Occurred:)

By the Court: Well, gentlemen, as I understand there's no need of taking any additional proof in this case?

Mr. Sandidge: Yes, sir, that's our position, after we file our counter-affidavits.

Mr. Dawson: What's that?

Mr. Sandidge: He said, is there any reason to take any additional proof.

Mr. Dawson: I don't see any need for oral testimony.

By the Court: I mean, all the facts are submitted—

Mr. Sandidge (Interrupting): Just about.

By the Court (Continuing): —or will be soon.

Mr. Sandidge: Yes, sir.

By the Court: Well, now, I understand that the plaintiff wants one week in which to file the affidavits that they desire to have in this record. And what about your briefs, gentlemen?

Mr. Sandidge: Your Honor, we will have our brief ready five days after the affidavits. Well, we'll probably file them the same time we file the affidavits. I've already written them, frankly.

By the Court: Well, then let the plaintiff file his brief ten days from today.

Mr. Sandidge: All right.

By the Court: And Judge (Dawson), what time do you want?

Mr. Dawson: Whatever time they've got. Well, I have to get his brief.

Proceedings

By the Court: Do you want ten days?

Mr. Dawson: But we won't take that much.

By the Court: Well, ten days thereafter for the defendants to file their brief.

Is there anything else, gentlemen? If not, Mr. Marshal, you may adjourn court.

(Whereupon, at This Point the Proceedings Were Terminated.)

ORDER.

This case was called in open court on August 18, 1960 and there appeared Mr. John P. Sandidge and Mr. Marvin Jones, for the plaintiff, Mr. Charles I. Dawson, Mr. Ed Shaeffer, Mr. V. C. Shuttleworth, Mr. Harold MacLaughlin, Mr. Russell Day and Mr. Wayland Sullivan, for the defendants.

Counsel having been heard and the Court being advised,

IT IS ORDERED:

1. That the amended complaint be filed.

2. The defendant having this day filed affidavits into evidence, the plaintiff is given one week in which to file counter affidavits.

3. The plaintiff will have ten days in which to file its brief. The defendant will have 10 days thereafter to file its brief.

(s) Henry L. Brooks,
United States District Judge.

August 19, 1960.

For the Plaintiff:
Mr. John P. Sandidge,
Kentucky Home Life Bldg.,
Louisville, Kentucky.

For the Defendants:
Mr. Charles I. Dawson,
Kentucky Home Life Bldg.,
Louisville, Kentucky.

AFFIDAVIT OF W. T. WALLACE.

Affiant, W. T. Wallace, states that he entered service of the Louisville and Nashville Railroad Company as stenographer-clerk in the Mechanical Department at Montgomery, Alabama, on September 23, 1929. He was subsequently promoted to Chief Clerk and served in that capacity in both the Transportation and Mechanical Departments at Montgomery, handling correspondence, claims and agreement matters on division level. Effective April 1, 1948 he was promoted and transferred to the Personnel Department, Louisville, Kentucky, as a Staff Assistant. On April 16, 1960 he was further advanced to the position of Assistant to the Director of Personnel.

During the entire twelve years he has been in the Personnel Department he has been assigned to assist in the handling of discipline involving all classes of employes on the system. In addition, he negotiates, interprets and handles working rules agreements covering yardmasters, train dispatchers, telegraphers and other classes of non-operating employes on a system level, representing the Director of Personnel, who is the highest officer of the railroad designated to handle such matters.

He is thoroughly familiar with the entire handling of the Fireman B. G. Humphries case from the time of Humphries' improper conduct which resulted in his dismissal to the present controversy over the application of Award 18720 issued by the First Division of the National Railroad Adjustment Board on May 14, 1958, specifically that part of the award involving money payment due Fireman Humphries.

The affiant believes that the facts as stated in the carrier's submission of June 13, 1957 to the First Division, National Railroad Adjustment Board, a copy of which,

together with the transcript of the hearing, is attached hereto as Exhibit "A",[1] are true; that on February 15, 1956, while off duty, Fireman B. G. Humphries came on company's property at its South Louisville, Kentucky, roundhouse and engaged in an altercation with an employe, Hostler Helper Meeks, who was on duty and carrying out the business of the carrier, Humphries going so far as to strike Meeks in the eye. Later the same night, Fireman Humphries again came on carrier's property at its 10th Street Roundhouse near the Union Passenger Station. He took it upon himself at that time to question another employe, Switchtender A. S. Beckert, who was on duty and carrying out the carrier's business, asking if he worked during a strike in the Spring of 1955. When he learned Beckert had seen fit to work during the strike, Fireman Humphries proceeded to strike him on the head. Charges were preferred against Fireman Humphries by the Assistant Superintendent in accordance with the discipline rule of the firemen's agreement and investigation was afforded him on February 28, 1956. Evidence adduced at the investigation confirmed the fact that Fireman Humphries was guilty of assaulting two employes who were on duty. Furthermore, this was by no means the first time Fireman Humphries had been guilty of improper and vicious conduct towards other employes (Exhibit BB attached to Exhibit A of this affidavit). On March 31, 1956 Humphries was dismissed.

On April 11, 1956 General Chairman Paschall wrote the Director of Personnel protesting the dismissal of Fireman Humphries and asking that he be restored to the service and paid for time lost. The caption of that letter was:

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[1]This Exhibit is printed in this Appendix at pp. 91b-114b, *supra*.

Affidavit of W. T. Wallace

"Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Article 31."

In view of the seriousness of Fireman Humphries' misconduct, the claim for his reinstatement with pay for time lost was denied.

The claim was subsequently discussed with General Chairman Paschall by Assistant Director of Personnel Clark and the affiant on several different occasions, and in each instance the railroad declined to give consideration to restoring Humphries to the service because of the viciousness he had displayed towards other employes, and his prior unsatisfactory service. Because the carrier would not accede to the demands of the firemen's organizations a strike was threatened.

Affiant believed that the proper and lawful method for disposition of the dispute was to submit it to the National Railroad Adjustment Board. Accordingly, to settle the controversy and to forestall the possibility of a strike, the carrier submitted the Humphries case to the First Division, National Railroad Adjustment Board. The affiant assisted in preparation of that submission which was made on June 13, 1957, copy attached as Exhibit A. The claim was presented to the Board in the exact wording as it was originally presented to the Carrier by General Chairman Paschall, which was:

"Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Article 31."

In his affidavit of August 17, 1960, General Chairman Paschall states that the carrier in submitting the claim to

the Board did not include the question of whether or not, in event the Board awarded Humphries' reinstatement with pay for lost time, the amount of that pay was subject to reduction by the amount which Humphries might earn from other sources while laid off from his job. Carrier representatives did not include that question for the following reasons:

First, the carrier submitted to the Board the exact claim as was originally submitted to it on the property by General Chairman Paschall. Had it not done so, and had it changed the claim by adding to it the matter of deduction of outside earnings in the event of an award ordering pay for time lost, the labor organization might have contended that the claim as presented to the Board had never been presented and handled to a conclusion on the property, and challenged the right of the Board to assume jurisdiction and decide it.

Second, the carrier knew that the investigation afforded Humphries contained substantial and convincing evidence in support of the serious charges against him and that his dismissal was fully justified, and was fully convinced the Board would decline the claim for his reinstatement so that no money payment would be involved.

Third, even in the event of an award ordering Humphries restored to service and paid for time lost, carrier had always understood and interpreted Article 31 of the firemen's agreement to permit deduction of outside earnings, if any, from the amount the fireman would have earned had he remained in railroad service. When reinstating Fireman T. Y. Alston with pay for time lost about two years previous, carrier had called on Fireman Alston for a statement of his outside earnings. Fireman Alston informed the carrier in writing that he had no outside earnings, and the Director of Personnel so informed General Chairman Paschall. Mr. Paschall did not make the contention then

that he is making now, i. e., the carrier does not have the right under the rule to consider outside employment in arriving at the amount that may be due a fireman ordered restored to service and paid for any time lost.

Affiant states that the claim in the Humphries case was made by the labor organization and not by the carrier, and knowing the position of the carrier in the Alston case, if the General Chairman did not agree with it he should have, in presenting the Humphries' claim, made claim for time lost without deduction of outside earnings, which he did not do.

The regular members of the First Division could not agree on whether the claim should be denied or allowed and Referee Mortimer Stone was assigned to break the deadlock. On May 14, 1958, the Board with Referee Stone sitting as a member, issued its Award 18720 ordering Fireman Humphries restored to the service with pay for time lost as the rule is construed on the property. It did so, not on the basis that Humphries was not guilty of the offense for which he was discharged, but rather on what the majority considered was a technical defect because the carrier failed to take statement at the investigation from an employe who was present when Switchtender Beckert testified Humphries struck him. Copy of Award 18720 is attached as Exhibit B.[1]

In compliance with the Award, on May 17, 1958 the Director of Personnel ordered Fireman Humphries restored to the service, and asked the division superintendent to prepare a statement showing time lost by Humphries as a fireman due to his dismissal and to call on Humphries for a statement of his earnings in other employment while out of carrier's service. The Director of Personnel so advised General Chairman Paschall by letter same date. Mr.

[1]This Exhibit is the same as the Exhibit printed in Appendix of Defendants-Appellants, pp. 17a-19a.

Paschall replied to the Director of Personnel on May 20, 1958, in part as follows:

> "Earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule and no other construction could be placed upon the rule as well as the Award of the Board. In this connection your attention is directed to Awards 5248, 16245, 17030 and 17644 of the First Division, National Railroad Adjustment Board, in which earnings in outside employment are not deducted from the time lost payments, and there are many other Awards. In those cases payments were made for full time lost without any deduction for earnings in outside employment. Accordingly, we will except Mr. Humphries to be paid for full time lost."

Affiant states that during his twelve years of service in the Personnel Department he has always understood and interpreted Article 31(f) of the firemen's agreement, and other similar discipline rules, to permit the deduction of outside earnings, if any, in determining lost time to be paid a discharged employe being restored to service with pay for time lost due to his dismissal. This is based on the record of the handling of other cases and upon the wording of the rule itself.

The rule in question, Article 31(f) of the firemen's agreement reads:

> "If the discipline adminstered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken.
>
> "Note: This Section applies only where a fireman is held out of the service or taken out of the service on account of his responsibility, and does not refer to

loss of time on account of being held off of his run to attend investigation."

Affiant believed and still believes that the rule recognizes that there will be instances where a fireman is discharged and later restored to the service because of the discipline not being sustained, who will suffer no loss of time or only a partial loss of time; otherwise, the word "any" would be superfluous and without meaning. The purpose of the rule is to make a man "whole" and not that he should gain financially because of having been discharged as would be the case if the interpretation the employes seek to place on the rule were correct.

On June 26, 1958, affiant prepared the following reply which the Director of Personnel made to the General Chairman's letter of May 20, 1958:

"LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville 1, Kentucky

June 26, 1958

"Mr. Jake Paschall, General Chairman
Brotherhood of Locomotive Firemen &
Enginemen
Louisville, Kentucky

Dear Sir:

"Please see our exchange of correspondence concerning Award 18720 of the First Division, National Railroad Adjustment Board, involving Fireman B. G. Humphies, Louisville (M.S.1st) Division.

"Following necessary physical examination and qualification by the District Surgeon, Fireman Hum-

phries was notified on May 29, 1958, that he could mark up for service. He stated that he could not go to work at that time, but would report later. Humphries actually returned to work on June 16, 1958, placing himself on a third shift yard engine.

"We have secured from our Accounting Department necessary data for determining what Mr. Humphries would have earned as fireman between March 31, 1956 and May 29, 1958, had he not been discharged, and are ready to discuss with you the money payment due him under Award 18720. But we certainly cannot agree with you that his outside earnings during the time he was out of L. & N. service should not be deducted.

"The Awards of the First Division involving L. & N. employes who had been discharged or held out of service for other reasons, when the employes were reinstated with pay, have not been consistent. Some Awards have simply specified the employe would be paid full wages for time lost, at least one specifically provided for deduction of outside earnings and another denied such deduction. Others, including Award 18720 in the Humphries case, provided pay for time lost *as the rule is construed on the property.*

"Never has a discipline rule under any agreement this Carrier has with its various classes of employes, including Article 31 of the Fireman's Agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record of ever having done more than make any employe whole when he had other employment while out of L. & N. service in compliance with a Board Award or otherwise. On the other hand, Awards of other divisions of the National Railroad Adjustment Board have consistently

recognized the principle that deduction of outside earnings is proper. For instance, we recently reinstated a shop laborer at Nashville in compliance with an Award of the Second Division and deduction of outside earnings was made in line with the discipline rule of the F. & O. Agreement.

"I would also call your attention to the common law rule, universally applied by the courts, to the effect that the measure of damages, where a breach of contract is claimed and an employe is wrongfully discharged, is determined by ascertainment of what he would have earned in the employ of the employer, had he not been wrongfully discharged, less any amounts earned in other employment, or which might have been earned by due diligence during the period. This principle of law has been applied by the courts in cases involving railroad claims. In fact, the discipline rule of the Conductors' Agreement, materially the same as Article 31 of the Firemen's Agreement, has been interpreted by the courts as permitting deductions for outside earnings. The case I refer to involves the decision of the Court of Appeals in the case of Louisville and Nashville R. Co. v. Wells, decided March 3, 1942 (289 Ky. 700, 702-706). In that case the Court had the following to say with respect to plaintiff's claim for loss of earnings as a railroad conductor in connection with his allegation that he was unjustly dismissed in violation of Article 31 of this Agreement:

'4. The plaintiff did not plead or prove that he had been unable to procure any employment during the six years and more since his alleged recovery or that he had not earned any money at all. When a contract for personal services has been wrongfully terminated by an employer, it is the duty of the

employe to minimize his damages by diligently seeking to find similar employment in the locality. He cannot sit by idly. He cannot recover more than the difference between the contract wages or salary and the amount he earned or could have earned with reasonable diligence. And on this element of a right of action for damages for breach of contract of employment, the burden is on the plaintiff to allege and prove that he exercised reasonable diligence in the respect stated and his inability to earn anything, if such was the case, or what he earned during the period. John C. Lewis Company v. Scott, 95 Ky. 484, 487, 23 S. W. 192, 44 Am. St. Rep. 251; Abrams v. Jackson County Board of Education, 230 Ky. 151, 18 S. W. (2d) 1000; Torson Construction Company v. Grant, 251 Ky. 800, 66 S. W. (2d) 79. There was neither pleading nor proof of this fact, so even had the other fatal defects not existed, he would have been entitled to recover only nominal damages. Newport Dairy v. Shackelford, 261 Ky. 754, 88 S. W. (2d) 940.'

"In your letter of May 20, 1958, you contend earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the rule. We do not agree. To the contrary, we consider outside earnings in every case, and the four awards to which you refer do not support your contention.

"Award 5248 involved Conductor J. B. Cooper who had no outside earnings.

"Award 16245 involved Conductor T. J. Holbrooks who had no outside earnings. Furthermore, the settlement in that case included his retirement from active service.

Affidavit of W. T. Wallace

"Award 17030 involved Fireman T. Y. Alston who had no outside employment.

"Award 17644 involved Yardman C. C. Neal who was only out of service 87 days. Outside earnings were definitely considered in that case. In fact, in our submission to the Board we stated that if for any reason the claim was sustained the money payment to Neal should be the wages he lost as yardman, less any earnings from other employment. And we said to the Board, as we are saying to you now, 'This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period.' In their rebuttal the employes did not challenge this statement of the carrier and it was our position the Board intended for deduction of outside earnings when it sustained the claim for pay for time lost to and including August 1, 1951 *as per rule*. It is likewise our position the Board intended outside earnings to be deducted from the time lost by Fireman Humphries when in its Award 18720 the Board ordered him paid 'as the rule is construed on the property.'

"In handling with Mr. Neal as to his outside earnings he certified that he was employed only a part of the short time he was out of L. & N. service. He further stated that in order to secure such part time employment he had to move to Cincinnati and then, of course, had to move back to Ravenna when he was put back to work as yardman. On Mr. Neal's statement that the extra expense he was put to off-set the amount he earned, Management considered he in effect had no outside employment and in line with our practice of making employes whole he was paid in full for the wages he lost while out of L. & N. service."

"Had Mr. Neal realized a net gain from his outside employment, Management most certainly would have insisted on deducting such earnings from the amount due him representing his lost time as a yardman.

"Fireman Humphries has declined to furnish statement of his outside earnings. If and when this is done, we are ready to make whatever money payment may be due him under Award 18720.

"Yours truly,

(s) W. S. Scholl,
Director of Personnel."

General Chairman Paschall did not agree with the position taken by the Director of Personnel and requested a conference to discuss the matter further. Conference was held on July 7, 1958, the Director of Personnel being represented by Mr. J. B. Clark and the affiant, W. T. Wallace. General Chairman Paschall was accompanied by Messrs. H. J. Roadcup, L. G. Mulinix and N. E. Lane, the latter three being respectively the General Chairmen of the engineers, conductors and trainmen. The four General Chairmen urged that management go ahead and pay Humphries without deduction of outside earnings in accordance with their interpretation of the rule and award. Carrier representatives refused to do so, restating their position that the deduction was contemplated by the rule and the award.

A further conference was had on July 30, 1958 between the same parties who participated in the July 7, 1958 conference and in addition a Vice President of each of the four brotherhoods was also present. Carrier again refused to comply with the demand that Fireman Humphries be paid without deduction of outside earnings. At the conclusion of that conference the carrier representatives were asked to write General Chairman Paschall further concerning the

position of management. The request was complied with by the Director of Personnel in letter of August 9, 1958 addressed to Mr. Paschall, reading as follows:

"LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville 1, Kentucky

August 9, 1958

"Mr. Jake Paschall, General Chairman
Brotherhood of Locomotive Firemen &
Enginemen
Louisville, Kentucky

"Dear Sir:

"This letter has further reference to the case of Fireman B. G. Humphries who was restored to the service in June of this year in compliance with First Division Award 18720. It is being written at your request to confirm the several conferences we have had, the last one on June 30th, concerning our disagreement over the proper application of that part of the Award reading 'with pay for time lost as the rule is construed on the property.'

"As we have advised you, both by correspondence and in conference, we interpret Award 18720 to mean that any outside earnings Fireman Humphries may have had while out of L. & N. service should be deducted from the amount due him under the Award. I wrote you on June 26, 1958, stating in detail the reasons we feel this is the only proper interpretation that can be placed on the wording of the Award.

"It was your position in the conferences that the Board did not have before it for consideration the

matter of outside earnings in the Humphries' case. You and the other general chairmen further contended that earnings in outside employment have never been taken into consideration in settling claims for time lost on this property under the discipline rules covering our engineers, firemen, conductors and trainmen. In connection with the latter contention considerable emphasis was laid on recent First Division Awards involving Fireman T. Y. Alston and Yardman C. C. Neal.

"We cannot agree with either of the positions taken by you. The very wording of the Award leaves no room for reasonable doubt that the Board had the matter of outside earnings in mind, otherwise there would have been no basis for ordering claimant paid 'as the rule is construed on the property.' Furthermore, we are definitely advised the matter of consideration of outside earnings was before the Referee at the time he considered this case and made the Award, having been presented to him on brief by a carrier member of the Board as has been customary for the past several years.

"As to the contention that outside earnings have never been taken into consideration in settling claims for time lost on this property, I certainly cannot agree. To the contrary, from my personal knowledge and from information contained in our files, I know Management has always given consideration to outside earnings a man, who is to be reinstated with pay, may have had while out of L. & N. service. And as stated in my letter of June 26, 1958,

> 'Never has a discipline rule under any agreement this Carrier has with its various classes of employes, including Article 31 of the Firemen's Agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record

of ever having done more than make any employe whole when he had other employment while out of L. & N. service in compliance with a Board Award or otherwise. . . .'

"The cases involving Fireman T. Y. Alston and Yardman C. C. Neal referred to above, support our position in the matter rather than yours. In the Alston case we called on him for statement of his outside earnings and attached hereto is copy of statement he signed June 21, 1955, advising he made no money in outside employment. In our letter to you under date of August 26, 1955, we advised you as follows:

'Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board, which, of course, have to be deducted from the amount due him.'

"This leaves no doubt that management did give consideration to outside earnings in the Alston case. Furthermore, it is significant that you did not at that time challenge the right of management to secure such information from Fireman Alston or take the position that the rule prohibited the carrier from considering outside employment in arriving at amount that may be due an employe when ordered restored and paid for all time lost under the terms of Article 31 of the firemen's agreement.

"Again, the C. C. Neal case supports our statement that management does consider deduction of outside earnings to be proper and permissible under discipline rules. In that case we made the following statement to the Board in our submission dated December 18, 1951:

'If, despite the gravity of the offense committed by the claimant and despite the oft-repeated declaration by the First Division that the measure of discipline is not a matter for its consideration, and its numerous declarations that it will not substitute its judgment for that of the management in discipline cases, the Division should conclude that the claim involved herein should be sustained and the claimant paid for any time lost, then this Company, without waiving its position as to the merits of this claim, submits that the Division should find and award that the claimant be paid only for time actually lost by reason of the discipline imposed, that is, for the days the claimant was available and stood for work in his class or craft, less any earnings from other employment. This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period.'

"General Chairman Lane made his rebuttal to our submission on January 7, 1952. That rebuttal challenged numerous statements made by the carrier, but very significantly took no exception whatever to the above statement made by us concerning the matter of deduction of outside earnings.

"The record simply will not support your contention that no consideration has ever been given to outside employment in settling claims for time lost on this property under the rule. Then let us look at the rule itself. You contend management is attempting to read something into the rule that is not there when we say the rule permits deduction of outside earnings. Then you turn right around and attempt to enlarge on the

rule by saying it prohibits any consideration being given to time earned in outside employment in determining time lost because of the disciplinary action taken whereas the rule contains no such prohibition.

"Management is not attempting to enlarge on or change the wording of the rule. We simply say again that the rule as written does not prohibit consideration being given to the time a fireman may have made in outside employment in arriving at time lost by him as a result of disciplinary action.

"Those who originally wrote the rule are long since gone. But as above stated, from my personal knowledge and as far as I have been able to determine from the record, management has always considered deduction of outside earnings to be proper under the rule. The rule as written certainly does not prohibit this being done and as pointed out in our letter of June 26, 1958, Article 31 of the conductors' agreement on this property, materially the same as Article 31 of the firemen's agreement, has been interpreted by the Courts of Kentucky to permit deduction of outside earnings.

"We have complied with that part of Award 18720 with respect to restoring Fireman Humphries to the service. We stand ready to comply with the balance of the award, which we interpret to permit deduction of outside earnings, as soon as Fireman Humphries furnishes the requested statement showing this information so that the amount due him under the Award may be determined.

"Yours truly,

(s) W. S. Scholl,

Director of Personnel."

Copy: Mr. W. E. Mitchell
Vice President, BofLF&E
Louisville, Kentucky."

Affidavit of W. T. Wallace

Radnor, Tenn., June 21, 1955

"Mr. C. A. Ellner:

"This is to advise that I have made no money in outside employment since my dismissal in February 1953 as I have been unemployed since that time.

(signed) T. Y. Alston,
Yard Fireman."

A copy of carrier's December 18, 1951 submission to the First Division, National Railroad Adjustment Board, in the C. C. Neal case, referred to in above quoted letter, is attached as carrier's Exhibit C.[1] Attention is invited to what is said on page 8 concerning the matter of deduction of outside earnings. A copy of General Chairman Lane's January 7, 1952 rebuttal to that submission is attached as carrier's Exhibit D.[2] That claim involved only pay for time lost as Yardman Neal was already back in carrier's service. It will be noted that while General Chairman Lane took numerous exceptions to what was said by the carrier, he did not disagree in any way with the position taken by the carrier with respect to its right to deduct outside earnings in the event the lost time claim of Neal were sustained. It was only after the award had been made, and Yardman Neal was called on for statement of his outside earnings that General Chairman Lane registered any protest. It can only be concluded that he did so belatedly at the request of some other organization who wanted to take the same position they are all taking now, i. e. payment of lost time must be made without consideration being given to earnings in outside employment.

At page 7 and elsewhere in his affidavit of August 17, 1960, General Chairman Paschall makes the statement that

[1]This Exhibit is printed in this Appendix at pp. 168b-179b, *infra*.
[2]This Exhibit is printed in this Appendix at pp. 180b-184b, *infra*.

at the conferences concerning payment due Fireman Humphries under Award No. 18720 "the Railroad Company insisted on its alleged right to make the deduction of outside earnings, and declared its intention to make such deduction in settlement of the Humphries award and in settlement of all unsettled outstanding awards and in all future awards to any member of each of the four unions". This is not a full and correct statement of what transpired. The facts are that at the conferences of July 30, 1958 and January 23, 1959, the carrier representatives told the union represenfatives that Management had always understood and interpreted the rule to permit deduction of outside earnings, if any; that to their knowledge gross wage loss had never been paid when the carrier had knowledge that the employe being reinstated had outside earnings; and that Management was not attempting to enlarge on or change the wording of the rule or its proper application. In support of their position that Management had in the past considered the matter of outside earnings, carrier representatives cited two specific reinstatement cases where the men were called upon to advise what, if any, outside earnings they had; these being fireman Alston, reinstatement in 1955, and yardman Neal, reinstated in 1956. One of the General Chairmen (as affiant remembers Mr. Roadcup) did ask what our position would be with respect to deducting outside earnings if the carrier received an award ordering reinstatement of an engineer or conductor with pay for time lost. Carrier representatives called attention to the fact that the Board had ordered men reinstated and paid under many different conditions, even on this railroad, and then stated if the board were to issue an award in the future ordering a member of either of the four brotherhoods reinstated with pay, and that award read the same as the award involving Fireman Humphries, it would be Manage-

ment's position that it was entitled to deduct outside earnings, if any, in determining lost time.

To show the various stipulations of the Board with respect to paying employes being restored to the service, the following awards of the First Division, National Railroad Adjustment Board, are cited:[1]

> Award 18991—ordered L&N trainman J. H. Johnson reinstated, without pay for time lost. Copy attached as Exhibit E.
>
> Award 15655—ordered L&N conductor T. C. Smith reinstated with pay, without deduction of outside earnings, if any. Copy attached as Exhibit F.
>
> Award 12629—ordered L&N conductor W. W. Fisher reinstated with pay for time lost reduced by outside earnings, if any. Copy attached as Exhibit G.
>
> Award 17025—ordered FW&D engineer G. H. Massengale reinstated with pay beginning one year from date of dismissal. Copy attached as Exhibit H.
>
> Award 3512—ordered NYC&StL engineer A. Z. Metcalfe reinstated with pay for one-half time lost on basis his violation of Rule g, prohibiting the use of intoxicants, was a mild one. Copy attached as Exhibit I.

In his supplemental affidavit of August 18, 1960, General Chairman L. G. Mulinix refers to Award 15655 issued August 8, 1952 wherein the First Division of the National Railroad Adjustment Board ordered Conductor T. C. Smith restored to service and that he be paid for time lost without deduction of outside earnings, if any. In that affidavit,

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[1]The following Exhibits are printed as a part of this Appendix on the following pages:

Exhibit "E"—pp. 185b-186b, *infra*.
Exhibit "F"—pp. 187b-191b, *infra*.
Exhibit "G"—pp. 192b-193b, *infra*.
Exhibit "I"—pp. 194b-195b, *infra*.

affiant Mulinix stated "In that case, the question of whether or not the Railroad Company was entitled to deduct Smith's outside earnings in the settlement of any award for time lost which might be made in his favor was *expressly raised by the Railroad Company*, . . ." This is not so. A copy of the carrier's submission in the Smith case is attached as Exhibit J.[1] Nowhere in that submission did the carrier make any mention whatever of the matter of deduction of outside earnings because it knew Conductor Smith was receiving disability annuity and had no outside employment. It is true that the Board did consider and determine the question of outside earnings in that case. It did so, however, without either party raising that issue in their submissions to the Board.

In his affidavit General Chairman Mulinix makes no mention of a very similar case on this property involving Conductor W. W. Fisher, which case was also appealed to the First Division, National Railroad Adjustment Board, by his organization. As in the Smith case, the carrier had taken Conductor Fisher out of service because of physical impairment. On February 14, 1949, the First Division issued its Award 12629, ordering Conductor Fisher restored to service if he could pass an unbiased medical examination and that he be paid for time lost reduced by outside earnings, if any. A copy of that decision is attached as carrier's Exhibit G.[2]

The conflicting findings of the Board in the Smith and Fisher cases are good examples of the confusion resulting from referee decisions involving payment for time lost.

Information reached the carrier that the organizations were taking a strike vote in connection with the Humphries award. In order to bring the controversy to a conclusion,

[1]Exhibit "J" appears on pp. 196b-208b, *infra*.
[2]Exhibit "G" appears on pp. 192b-193b, *infra*.

and to avoid the possibility of a work stoppage, on September 23, 1958 the carrier made request on the First Division, National Railroad Adjustment Board, for an interpretation of its Award 18720 with respect to pay for time lost inasmuch as the carrier and the firemen's organization could not agree on the proper interpretation of Article 31(f) of the agreement with respect to deduction of outside earnings. Copy of that request is attached as Exhibit K.[1]

On December 17, 1958 the Board issued its so-called Interpretation, copy attached as Exhibit M, wherein the majority held as follows:

> "The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.
>
> "In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period held out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.
>
> "Facts and supporting data as to that issue were not included in the docket on which Award 18720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not now determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17500 and 'Interpretation' thereof."

This was not a unanimous decision by the Board as Judge Dawson stated to the Court in his oral argument on

[1] L&N's Request for Interpretation of Award 18720 is printed in this Appendix on pp. 115b-125b, *supra* (Plaintiff's Exhibit No. 11 at Oral Hearing).

August 18, 1960. To the contrary, it was a decision by the Referee because the regular Board members were equally divided.

Following refusal of the Board to resolve the dispute, a further conference was had on January 23, 1959. At that conference Management was represented by Assistant Director of Personnel J. B. Clark and the affiant, W. T. Wallace. Organization representatives present were: Vice President W. E. Mitchell and General Chairman Jake Paschall of the firemen's organization, Asst. Grand Chief Engineer H. W. Haskins and General Chairman H. J. Roadcup of the engineers' organization, Vice President C. J. McClain and General Chairman J. M. King of the trainmen's organization, and General Chairman L. G. Mulinix of the conductors' organization. At that meeting the organizational representatives again demanded that Fireman Humphries be paid gross earnings without regard to outside earnings, and advised a strike date would be set if this was not done. Carrier representatives declined to do so and suggested that the orderly and lawful way to handle would be to submit the dispute to the Adjustment Board as a "new issue" which the Board in its interpretation had said it was. The union representatives would not agree, and asked that the carrier notify them by letter stating the carrier's position.

On the same date, January 23, 1959, carrier submitted the dispute ex parte to the First Division, National Railroad Adjustment Board, as a new claim as the Board had said it was, and as the Carrier had the right to do under the Railway Labor Act. A copy of that submission is attached as Exhibit L.[1] A letter was also addressed to the union representatives furnishing them with a copy of the

[1]This Exhibit is the same as Exhibit "C" to the Complaint which is printed in this Appendix at pp. 3b-17b, *supra*.

submission with the statement that it covered Management's position fully.

Notwithstanding the fact that the dispute was then before the National Railroad Adjustment Board, on February 10, 1959 General Chairmen H. J. Roadcup, Jake Paschall, L. G. Mulinix and J. M. King addressed the following telegram to the Director of Personnel advising that the employes they represented would strike at Noon, Friday, February 13, 1959:

"TELEGRAM

Louisville, Ky. Feb. 10, 1959.

"W S Scholl Director of Personnel Louisville & Nashville Railroad
908 West Broadway Lville

This Will Advise Employes Represented By BLE - BLF&E CRC&B And BRT Will Withdraw From Carrier's Service At 12:00 Noon Friday February 13, 1959 In A Joint Legal Strike Approved And Authorized By The Brotherhood's Chief Executives Due To Carrier's Adamant Insistance That Outside Earnings Of Fireman Humphries Must Be Deducted From Any Money Due Him Under Award 18720

H J Roadcup Jake Paschall L G Mulinix J M King"

On the same date, February 10, 1959 the Director of Personnel received the following telegram from the Executive Secretary of the National Mediation Board, Washington:

Affidavit of W. T. Wallace

"TELEGRAM

Washington, D. C., Feb. 10, 1959

"W. S. Scholl, Dir Pers.
Louisville & Nashville Railroad Co. Lville

Following Wire Received From Messrs. Brown, Gilbert, Paddock And Kennedy 'Strike Of Employes Represented By BLE, BLF&E, ORC&B And BRT On The Louisville And Nashville (Proper) Set For Twelve Noon Friday February 13 1959 Account Refusal Of Carrier To Apply Award 18720 First Division NRAB. Please Accept This Telegram As Seventy-Two Hour Notice In Cases Of This Kind.' Please Wire Statement

E. C. Thompson Exect Secy NMB"

The Director of Personnel replied to Secretary Thompson same date, as follows:

"TELEGRAM

Louisville, Ky., February 10, 1959.

"E. C. Thompson, Executive Secretary
National Mediation Board
Washington 25, D.C.

Your Wire Date Relative Strike Set For Noon Friday, February 13, 1959, Of Employes On This Property Represented By BLE, BLF&E, ORC&B And BRT In Connection With Application Of Award 18720, First Division, NRAB. That Award Ordered Fireman Humphries Restored To Service With Pay For Time Lost As The Rule Is Construed On Property. Humphries Is Back At Work. Because Unable To Agree With Firemen's Organization On Deductions For Outside Earnings From Pay For Time Lost, Carrier Asked First Division, NRAB, For An Interpretation Of Its Award

Affidavit of W. T. Wallace

18720. On December 17, 1958, First Division Held The Dispute Over Deduction of Outside Earnings In Determining Amount Due Humphries Is New Issue And Could Not Be Decided In The Guise Of An Interpretation Of Award 18720. Accordingly, On January 23, 1959, This New Dispute Was Submitted To The First Division, NRAB, For Decision. Copy Of That Submission Covered By First Division File L-1479 Being Mailed You Today. Since This Dispute Is Now Before NRAB For Decision, Threatened Strike Is Clearly Illegal Under Decision Of U. S. Supreme Court In Chicago River And Indiana Railroad Terminal Company vs. Brotherhood of Railroad Trainmen, 353 U. S. 30. In audition To Foregoing, BLF&E Is Only Organization Party To Award 18720 And Dispute Now Pending Before Adjustment Board, And BLE, ORC&B and BRT Have No Legal Right To Strike About Such Award And Dispute. Respectfully Submit Mediation Board Should Inform Involved Organizations That Their Strike Threat Is Illegal And Should Be Promptly Withdrawn And the Dispute Handled To Conclusion Before Adjustment Board.

W. S. Scholl,
Director of Personnel."

On February 12, 1959 carrier filed in this Court a suit to enjoin the unions from putting the illegal strike into effect, and a temporary restraining order was issued. At the same time the Court set the case for hearing on a motion for a preliminary injunction on February 18, 1959. As a result of that hearing the temporary injunction was continued in force until January 4, 1960 with the understanding that both parties would use their best efforts to prevail on the First Division of the National Railroad Adjustment Board to issue its decision on or before that date.

Affidavit of W. T. Wallace

On December 9, 1959 the Board, with Referee Carroll R. Daugherty participating, issued its Award 19363, copy attached as Exhibit M,[1] refusing to decide the issue and dismissing the case. The carrier members of the Board filed a vigorous dissent, pointing out that the award was an evasion of the plain duty of the First Division of the National Railroad Adjustment Board to decide a dispute squarely before it, in compliance with their statutory duty. A copy of that dissent is attached as carrier's Exhibit N.[2]

(s) W. T. Wallace.

Commonwealth of Kentucky }
County of Jefferson } ss.

Subscribed and sworn to before me by W. T. Wallace, this 25th day of August, 1960.

My Commission expires February 19, 1963.

(s) A. M. Bradford,
(Seal) Notary Public.

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[1]This Exhibit is the same as the Exhibit printed in Appendix of Defendants-Appellants, pp. 69a-72a.

[2]This Exhibit is the same as the Exhibit printed in this Appendix, pp. 131b-134b, *supra*.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "C".

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville, Kentucky

December 18, 1951
File K-306-3

Mr. J. M. MacLeod, Secretary,
National Railroad Adjustment Board,
First Division,
Chicago 3, Illinois.

Dear Sir:

Please refer to your letter of November 20, file L-1044, in connection with ex patre submission filed by General Chairman N. E. Lane, of the Brotherhood of Railroad Trainmen, in claim described as follows:

> "Claim of yardman C. C. Neal for compensation in amount he would have earned as switchman and/or engine foreman in Ravenna, Ky., yard, had he not been discharged by Carrier and held out of service until August 13, 1951."

Following is Carrier's answer to Employes' submission. Copy is being furnished the General Chairman:

CARRIER'S STATEMENT OF FACTS:

Ravenna, Kentucky, and Hazard, Kentucky, are on what is known as the Carrier's Eastern Kentucky Operating Division. The Carrier maintains a yard force at Ravenna and one at Hazard, but the forces at the two points are on separate seniority rosters. At Ravenna, Kentucky, where claimant was employed at the time of dismissal, generally there were three yard engine assignments on each

shift. At Hazard, Kentucky, there was generally one yard engine assignment on first shift, two on second shift, and one on third shift. As the number of yard assignments at each point was small, the number of extra board employes was, of course, limited.

In the early part of March, 1951, it developed that some yardmen, both regular and extra, at Ravenna and Hazard, were registering for ten hours' rest after working a shift of eight hours. This resulted in the employes not only dodging undesirable jobs, but made it difficult, if not impossible, to fill vacancies, especially on third shift assignments. It was necessary that the yard assignments on third shift be worked the same as yard assignments on first and second shifts. To work the assignments on third shift it was necessary to have yard employes for the assignments. Thus faced with the situation of having to protect the service, which was practically impossible with men laying off and those working requesting ten hours' rest, instructions were issued to the effect that ten hours' rest would not be granted to yard employes who had worked a shift of only eight hours. Those instructions were issued to all yardmen on the Division. The instructions applicable at Ravenna, Kentucky, were posted on March 29, 1951, and read:

> "The Company has been penalized in the past on account of shortage of foreman and switchmen due to the fact that in some instances these men have been requesting 10 hours' rest.
>
> "This is to advise that when a foreman or a switchman has been on duty only 8 hours, we will not grant his request to be off for more than 8 hours, and should his services be needed, he will be called in his turn on the board. This will also apply to regular assigned foremen and switchmen when needed for emergency service."

Affidavit of W. T. Wallace—Exhibit "C"

Similar instructions had been posted at Hazard, Kentucky, on March 12, 1951.

The Local Chairman of the trainmen's organization held a regular assignment as yard foreman at Hazard, Kentucky. When the above quoted instructions were issued and placed on the bulletin boards, the division officials of the Carrier contacted the Local Chairman and solicited his aid toward breaking up the practice that resulted in the issuance of the instructions.

On April 4, 1951, the Local Chairman and the General Chairman were in conference with representatives of the Director of Personnel in connection with some other matters on the Eastern Kentucky Division. At that time the matter of yardmen at North Hazard and Ravenna asking for ten hours' rest after working a shift of eight hours and the difficulties experienced in filling assignments on third shift was discussed briefly. The representatives of the employes stated that if the instruction that had been issued on the Eastern Kentucky Division with respect to yardmen requesting ten hours' rest following the working of a shift of only eight hours were cancelled as concerns regular men, they would not take exception to any such instructions that were issued applying to extra yardmen. In view of the trouble that had been experienced, no commitment was made by the representatives of the Director of Personnel.

The Local Chairman was in the office of the Assistant Superintendent of the Eastern Kentucky Division on April 5, 1951. At that time the Assistant Superintendent and Trainmaster discussed the entire subject with him, pointing out the necessity of having men to protect assignments. The Local Chairman told the Trainmaster and Assistant Superintendent that he had previously requested ten hours' rest, and while he thought the instructions, especially as concerned regular men, would soon be can-

celled, so long as the instructions were in effect they would be complied with.

The claimant, C. C. Neal, was on the yardmen's extra board at Ravenna, Kentucky. On night of April 13, 1951, there was a vacancy as switchman on the 11:00 p.m.—7:00 a.m. yard job at Ravenna. C. C. Neal, extra switchman-foreman, was the only man on the extra board at the time with eight hours' rest, he having worked as foreman on the 7:00 a.m.—3:00 p.m. yard assignment and having registered for ten hours' rest. About 10:00 p.m. the caller contacted Neal and gave him call to work as switchman on 11:00 p.m. assignment. Neal refused the call, saying he had marked up for ten hours' rest. The caller reported to the crew board clerk his conversation with Neal and the crew board clerk contacted Neal by telephone to be sure he understood he was called for 11:00 p.m. Neal told the crew board clerk that he had marked up for ten hours' rest and would not accept the call. In the conversation with the crew board clerk Neal said he was familiar with instructions issued on March 29 that requests from yardmen for ten hours' rest would not be honored when they had only been on duty eight hours, but notwithstanding those instructions he had marked up for ten hours' rest, and would not protect the service on third shift.

On April 21, 1951, charges were preferred against Neal as follows:

> "You are charged with responsibility in connection with refusing call as switchman on 11:00 p.m. yard job, Ravenna Yards, night of April 13, 1951, after having been properly called."

Investigation was conducted on April 25, 1951. The caller and crew board clerk testified as to their conversation with Neal at the time he was called. Neal was represented in the investigation by the Local Chairman and

yard committeeman. When asked to make a statement in the case, Neal simply stated:

"I do not desire to make a statement."

Copies of statements taken at investigation on April 25, 1951 are attached as Carrier's Exhibit "AA".

On May 7, 1951, Neal was dismissed from service for refusing to accept call.

On April 9, 1951, the Local Chairman of the Trainmen's Organization, J. C. Petrey, who, as heretofore shown, held a regular job as yard foreman on first shift at Ravenna, declined to accept call to work as switchman on third shift, giving as his reason that he was "Unable for duty." Investigation was conducted on April 20, 1951, involving case of Petrey. However, as he had claimed he was "unable for duty," a decision in the case was held up to see if a satisfactory understanding could be reached with the trainmen's Organization covering the entire question of yardmen on the Eastern Kentucky Division requesting ten hours' rest and difficulties experienced in filling vacancies. On June 25, 1951, satisfactory understanding was arrived at with the General Chairman. A copy of letter of that date addressed to the General Chairman setting forth the understanding arrived at in conference, and confirmed by the General Chairman, is attached as Carrier's Exhibit "BB".

As the matter of yardmen on the Eastern Kentucky Division requesting ten hours' rest to avoid protecting certain jobs was satisfactorily disposed of, the Carrier, on July 28, 1951, authorized the reinstatement of claimant Neal to the service with his former seniority, but as the evidence presented in the investigation on April 25, 1951, sustained the charges against him, and his dismissal was entirely justified, the Carrier would not agree to compensate him for the time he was out of the service.

Affidavit of W. T. Wallace—Exhibit "C"

POSITION OF CARRIER:

The responsibility for the safe, efficient and economical operation of the railroad rests upon the Management. To provide the service that is expected of it, it is essential for the Carrier to have employes to fill all assignments—not only those assignments that the employes may consider the most desirable from their standpoint, but all assignments must be filled.

As shown in Carrier's statement of facts, the situation was reached on the Eastern Kentucky Division, where it was extremely difficult, or practically impossible to fill vacancies occurring on third shift yard engine assignments at Ravenna, Kentucky, and North Hazard, Kentucky. This situation was brought about by some of the employes attempting to avoid service on third shift assignments. While the case of yard foreman J. C. Petrey, who is Local Chairman of the Trainmen's Organization, and whose regular assignment with the Carrier is as first shift yard foreman at North Hazard, Kentucky, declining to work on third shift on April 9, 1951, referred to in Carrier's Statement of Facts, was pending, the General Chairman of the Trainmen's Organization made investigation of the entire matter. On June 20, 1951, he wrote the Director of Personnel of the Carrier, in part:

> "I conferred with representative E. K. Division employees on June 15 and found the following:
>
> "The trouble was caused by certain extra yardmen at Hazard and Ravenna requesting 10 hour's rest after completion of an 8-hour tour of duty, apparently for the purpose of avoiding service on third shift. This resulted in senior regular men, generally those holding regular first shift assignments, being used off their regular assignments on third shift assignments, in emergecy, account no extra men available. In order

Affidavit of W. T. Wallace—Exhibit "C"

to protect themselves from use in emergency on third shift assignments, while extra men were working their regular first trick assignments, the regular men also began to request 10 hour's rest after completion of duty on their first shift assignments, this to avoid being used in emergency on third shift assignments, which, apparently, caused your local officials some trouble in filling vacancies on the third shift assignments. As a consequence, the local officials issued a bulletin-board order on March 29th advising yardmen that requests for 10 hour's rest following a tour of duty of only 8 hours, would not be granted and that they would be called in turn after their 8-hour rest period had expired.

"Local Chairman Petrey, while not in sympathy with the action of extra men in requesting 10 hour's rest following an 8 hour tour of duty, felt that this bulletin was in infringement upon the agreement, which it certainly was, in that it nullified the provisions of Section (h), Article 23 insofar as yardmen were concerned. He so advised the local officials and stated that he would expect the men's request for 10 hour's rest to continue to be respected. He also advised the men that the provisions of the agreement could not be superseded by arbitrary action of the local officials in posting a bulletin and that they were privileged to continue to request 10 hour's rest. Subsequently charges were preferred against Extra Ravenna Yardman C. C. Neal and regularly assigned Hazard Engine Foreman J. C. Petrey for declining to accept calls for service before 10 hour's rest period, which they had requested, expired. Switchman Neal was discharged and Foreman Petrey's case is pending decision."

Affidavit of W. T. Wallace—Exhibit "C"

The above letter shows what brought about the instructions of March 29, 1951—the employes attempting to dodge certain jobs. The Carrier does not agree with the contention of the Local Chairman and the contention of the General Chairman as shown in the General Chairman's letter of June 20, and which contention is now being made by the organization to this Board, that the instructions of March 29, 1951, were in conflict with Section (h), Article 23, of the trainmen's agreement, which reads:

> "(h) After completing a *trip*, employes will be entitled to and allowed 8 or 10 hours' rest *at terminal* if they give proper notice of such desire, except when needed in case of wrecks or similar emergencies." (Emphasis added.)

It will be seen that this rule refers to employes completing a "trip" being entitled to rest "at terminals." Obviously, it applies only to men in road service who make trips and have "terminals." Yardmen do not make "trips" and their services are confined to yards, within which they have points for going on and off duty—not "terminals." Further, the word "employes" as used in the rule is not as all-inclusive as the word "trainmen" as referred to in the preamble of the agreement.

The Carrier does not deny that in some yards yardmen, in the past, have been allowed ten hours' rest, when requested by them, but such requests were granted as an accommodation—not as an agreement right—when other men were available to protect the service and when the company would not otherwise be penalized. The yardmen in Ravenna Yard and North Hazard Yard were accommodated in that manner until it became obvious that the company was being penalized and that action to break up the sharp practices being indulged in at Ravenna and North Hazard Yards was required.

Affidavit of W. T. Wallace—Exhibit "C"

In the one instance cited by the Employes on Page 5 of their submission, quoting letter from former Assistant Director of Personnel Turner, it is shown that the employe there involved had been on duty 15 hours 55 minutes. That letter did not state that the employe, even after being on duty 15 hours 55 minutes, was entitled to ten hours' rest under the agreement, but merely indicated how the man should be handled after having been granted ten hours' rest. Of course, the Carrier would not object in a case of that kind—where a yard employe has been on duty almost sixteen hours—to granting the employe ten hours' rest on request if other employes were available.

Further, as shown in Carrier's Statement of Facts, when the Local Chairman of the Eastern Kentucky Division and the General Chairman, discussed with a representative of the Director of Personnel on April 4, 1951, the matter of the instructions of March 29, 1951, the representatives of the employes did not object to the instructions applying to extra men, but did ask that they be cancelled so far as regular men were concerned. The reasons for such request were obvious—the Local Chairman was a regular first trick yardman at North Hazard. The claimant in this case was an extra man, and the contention is now made that he had a contractual right under the agreement to ten hours' rest when requested.

Without in any manner waiving its contention that Section (h) of Article 23 of trainmen's agreement, does not apply to yardmen, the Carrier has shown—and the employes showed in the General Chairman's letter of June 20, 1951—the reasons for the instructions of March 29, 1951, being issued. That reason was to protect the service. The instructions were reasonable and were necessary. They were understood by the claimant and his representative. The aid of the Local Chairman was solicited in an effort

to protect the service. Notwithstanding the reasonableness of the instructions and the necessity for same, the claimant and the Local Chairman defied the instructions and defied the officers in charge. When called for service on third shift April 13, 1951, the claimant admitted he was familiar with the instructions, but said he had requested ten hours' rest and would not protect the service. Further, he showed his defiant attitude in the investigation on April 25, 1951. When asked for any statement he said:

"I do not desire to make a statement."

Thus, the case actually before the Board is one of an employe who defied instructions, defied the authorities in charge, and defied the officers in charge when asked to make a statement in connection with the charges against him. When called to work third shift on April 13, 1951, if he did not consider it proper for him to have been called, his recourse was to perform the work and then present his grievance or claim to the Carrier. (Award 11839 of this Division.)

The supervision of employes is in Management. Directions of the Carrier must be obeyed if the railroad is to be efficiently operated. The burden rests upon Management to comply with collective agreements entered into by the Carrier and its Employes. If the Carrier violates the agreement, the Railway Labor Act provides the recourse that the employe of organization may pursue. The directions of the Carrier, however, must be followed. Utter confusion would result if each employe were permitted to determine for himself if directions received were in accord with the collective agreement. A failure to carry out the directions of the Carrier, unless they exceed all bounds of reasonableness, constitutes insubordination. (Second Division Award No. 1459.) The instructions in this case were not unrea-

sonable. Also, see First Division Awards Nos. 11514 and 14217.

The discipline imposed on claimant by the Carrier, i.e., loss of pay from May 7, 1951, to August 11, 1951, for his defiance of instructions and authority was not unreasonable. Incidentally, Neal was notified on August 1, 1951, that he would be restored to service with former seniority, without pay for time lost, provided he reported for work within fifteen days from that date. Neal did not report until August 10, 1951, worked one day (August 11), laid off at 3:45 p.m., August 11, and did not again report until August 31.

The Carrier insists that for the reasons shown herein the claim should be declined.

If, despite the gravity of the offense committed by the claimant and despite the oft-repeated declaration by the First Division that the measure of discipline is not a matter for its consideration, and its numerous declarations that it will not substitute its judgment for that of the Management in discipline cases, the Division should conclude that the claim involved herein should be sustained and the claimant paid for any time lost, then this Company, without waiving its position as to the merits of this claim, submits that the Division should find and award that the claimant be paid only for time actually lost by reason of the discipline imposed, that it, for the days the claimant was available and stood for work in his class or craft, less any earnings from other employment. This Company has not at any time paid gross wage loss to an employe who was taken out of service as result of disciplinary action if the Company had knowledge that he had been employed during such period.

It is Carrier's understanding that claimant Neal actually worked for a construction company practically the entire

time he was out of the service from May 7, 1951 to August 11, 1951. In fact, when he laid off at 3:45 p.m., August 11, 1951, he advised the official in charge that he was returning to his job with the construction firm; that the construction firm had a job that would probably be finished in two weeks or so and it was his intention to continue working with the construction company at least that long. It is quite evident that he did continue at work for the construction company from August 11 until he again reported for work with the Carrier on August 31.

Oral hearing not desired.

Respectfully submitted,

(s) G. C. Howard,
Director of Personnel.

Copy—Mr. N. E. Lane,
General Chairman, B.R.T.,
Louisville, Kentucky.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "D".

GENERAL GRIEVANCE COMMITTEE
Brotherhood of Railroad Trainmen
L. & N. Railroad

Louisville, Ky.,
January 7, 1952
File 904-4872

Mr. J. M. MacLeod, Secretary
National Railroad Adjustment Board
First Division
Chicago 3, Illinois

Dear Sir:

Brotherhood of Railroad Trainmen

vs.

Louisville & Nashville Railroad

Claim of Yardman C. C. Neal for compensation in amount he would have earned as switchman and/or engine foreman in Ravenna, Ky. Yard, had he not been discharged by Carrier on May 7, 1951 and held out of service until August 13, 1951.

See your letter of December 20, 1951, your file L-1044.

Committee's rebuttal to Carrier's answer to Committee's submission in above captioned case.

Begininng at bottom of Page 5 and through next to last paragraph of its submission, the Carrier by a devious and curious method attempts to support its currently convenient position that Section (h), Article 23, Trainmen's Agreement, does not apply to yardmen.

During the more than 30 years life of this rule, the Carrier had never before this case arose, taken position that the rule had no application to yardmen. Yardmen's rights under the rule have *always been recognized.* Prior

to this case, there never had been any question about its application to yardmen. Try as it may, the Carrier cannot make a contrary showing from the record.

Next to last paragraph Page 6, of Carrier's submission, is quoted:

> "In the one instance cited by the Employes on Page 5 of their submission, quoting letter from former Assistant Director of Personnel Turner, it is shown that the employee there involved had been on duty 15 hours 55 minutes. That letter did not state that the employe, even after being on duty 15 hours 55 minutes, was entitled to ten hours' rest under the agreement, but merely indicated how the man should be handled after having been granted ten hours' rest. Of course, the Carrier would not object in a case of that kind—where a yard employe had been on duty almost sixteen hours—to granting the employe ten hours' rest on request if other employes were available."

Here the Carrier gives support to the Committee's position, as shown in Committee's submission, that:

1. Section (h), Article 23 of Agreement applies to yardmen.
2. Carrier is attempting to supersede Agreement rules with whims of local officials.
3. Change or abrogate agreement rules at will without notice as required by Railway Labor Act.

Section (h), Article 23 provides that after *completing a trip* employes will, upon request, be granted *8 or 10 hours rest.* This is the only rule in the Agreement referring to employes' right to claim rest after completing a trip. This rule does not provide that an employe must have been on duty a specific number of hours on a trip before being

entitled to 8 or 10 hours rest after its completion. But the Carrier, while maintaining this rule does not apply to yardmen, says:

> "Of course, the Carrier would not object in a case of that kind—where a yard employe had been on duty *almost sixteen hours*—to granting the employe 10 hours rest on request if other employes are available."

Here we find the Carrier tacitly admitting that the rule applies to yardmen if they have been on duty *"almost sixteen hours"*—i.e., changing the rule without notice or negotiation.

Yardmen on this railroad have rights under Agreement rules. Their rights to have and to maintain a "turn" on the extra board is conferred by Agreement rules, and this right is not contingent upon the Carrier's "objection" or "non-objection" under certain circumstances such as, for example, whether they have or have not been *"on duty almost sixteen hours"*. Whatever right they have is conferred by agreement rule.

In the case referred to in the Assistant Director of Personnel's letter, the yardman was granted 10 hours rest as provided in Section (h), Article 23. His turn was due to work before his rest period expired and the question was, should he maintain his position on the board, running other men around him, leaving him first out after his rest period expired.

In the absence of a rule (Sec. H, Article 23) conferring the right to 8 or 10 hours rest after completing a trip, there would have been no question. In the first place, his request for 10 hours rest would not have been recognized—and when he stood for call before expiration of 10 hours off duty, it would have been necessary for him to accept the call or lay off and lose his turn on the extra board. His

rights under the rule were recognized—he was granted 10 hours rest—other men were run around him until his rest was up—he maintained his place on the board and was first out when his rest period was up. The Carrier's Assistant Director of Personnel said this was correct. The General Chairman representing the employees concurred. The question of whether the man had been on duty "*almost sixteen hours*" did not enter the picture.

In the instant case, the local officials abrogated the rule by bulletin. The Carrier's Director of Personnel is now attempting only to amend it. He admits it applies to yardmen if they have "*been on duty almost sixteen hours*".

In paragraph beginning at bottom of Page 6 of its submission, the Carrier states:

> ". . . when the local chairman of the Eastern Kentucky Division and the General Chairman, discussed with a representative of the Director of Personnel on April 4, 1951, the matter of the instructions of March 29, 1951, the representatives of the employes did not object to the instructions applying to extra men, but they did ask that they be cancelled so far as regular men were concerned."

This is an incorrect statement.

At the conference with the Director of Personnel on April 4, 1951, the representatives of the employes pointed out that the bulletin board instructions of Kentucky Division local officials under date of March 29th constituted a violation of the Agreement—that yardmen were entitled, under provisions of Section (h), Article 23, to 8 or 10 hours rest, if requested, after completing a shift, and strongly insisted that these instructions be cancelled unqualifiedly. Nothing whatever was said about cancelling them as to regular men only.

Affidavit of W. T. Wallace—Exhibit "D"

The employe representatives did agree that *"if the instructions are cancelled,* we will see to it that extra men who have worked only an 8 hour shift and obviously are requesting 10 hours rest simply to avoid working third shifts (night jobs) in order to work first shifts (day jobs)—work the shifts they stand to protect." On this understanding, the employe representatives were assured by the Director of Personnel's representative that the March 29th instructions would be cancelled.

The Carrier did not keep this covenant. The instructions were not cancelled. The men at Ravenna and Hazard, therefore, insisted upon their right under a long established agreement rule, fully understood by both parties for more than 30 years, and continued to claim rest under it. This resulted in the illegal discharge of C. C. Neal, the claimant here.

Respectfully submitted,

(s) N. E. Lane,
General Chairman,
Brotherhood of Railroad Trainmen.
L. & N. System.

NEL:m
Cy—Mr. W. P. Kennedy, Pres., B. of R. T.
Mr. G. C. Howard, Director of Personnel, L&N RR.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "E".

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division
With Referee Mortimer Stone

Docket 34952
Award 18951

Parties to Dispute: Order of Railway Conductors and Brakemen The Louisville and Nashville Railroad Company

Statement of Claims: "Request that former Conductor-Brakeman J. H. Johnson be reinstated to active service with seniority rights unimpaired, vacation rights restored and paid for all time lost, due to his unjust and unwarranted dismissal from the service of the Louisville and Nashville Railroad Company."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meeting of the Railway Labor Act, as amended, and this Division has jurisdiction.

Hearing was waived.

Claimant flagman was aware that they were being followed by another train, without knowing how close it would run, and that when slowing for a stop to set out the bad order car, their train was moving under circumstances in which it might be overtaken by another train, so lighted fusee should be thrown off as provided by Rule 99 (d).

The conductor, who was in the caboose with claimant, admitted that they did not comply with the rule, and claimant's Local Chairman in his letter seeking reinstatement said he did not deny that claimant did not leave a fusee as prescribed by rule. Claimant gave as his reason for not throwing off a fusee, a bulletin instruction not to leave

fusees in block territory.' In fact that bulletin had been cancelled fourteen years before the accident. Claimant later admitted that he did not think of that bulletin that night and then gave as his reason: "I did not think it was necessary to leave the fusee and did not leave one."

Notwithstanding failure to throw off any fusees, claimant admitted that some time, not exceeding two minutes, elapsed after his train stopped, while he gathered his necessary equipment, before he left the caboose to protect his train. So it turned out that he had only seven minutes left to flag the approaching train and was passed by its engine before he had gone a half mile.

While not the proximate cause of the costly accident, and perhaps not a contributing cause, there was a violation of the operating rules and lack of the diligence properly required in such service. The negligence of the conductor who was present and in command of the train may appear to have been equally blameworthy, but that issue is not before us for determination.

Within three months after dismissal of claimant, carrier proposed to petitioner that he be restored to service without pay for time lost. Holding out of service for such period does not appear to be excessive or arbitrary and, through his refusal to accept such proposal, claimant himself is at fault for time held out thereafter. Accordingly we must hold that claimant should be restored to service without pay for time lost, as proposed by carrier.

Award: Claim sustained for restoration to service but without pay for time lost.

National Railroad Adjustment Board
by Order of First Division
Attest: J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois,
this 17th day of December 1958.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "F".

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division.
With Referee John A. Weeks

Award 15655
Docket 28562

Parties to Dispute: Order of Railway Conductors
Louisville and Nashville Railroad Company

Statement of Claim: "Claim of Conductor T. C. Smith, Pensacola Division, that he should be permitted to return to the service, as conductor, and that he be paid for time lost beginning with April 1, 1951."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Request for reinstatement by conductor and pay for time lost since April 1, 1951.

Following some surgery at the suggestion of carrier's medical examiner claimant applied for retirement which was granted. Subsequently his own doctors and those of the railroad approved his return to work, including the one who advised and recommended his retirement. Men on disability retirement under 65 years of age may return to work upon recovery from disability. Claimant is within the permissible age and has medical reports from both his own doctors and railroad doctors approving his return to work.

A refusal to reinstate when claimant is entitled thereto is the same as a wrongful discharge and will be considered

as such under Rule 31 of the conductors' agreement which provides for restoration to the service with full rights and paid full wages for any time he may have lost. The carrier was not justified in ignoring and overriding its own medical examiners. Claimant was entitled to return to work April 1, 1951 as a passenger conductor.

The carrier Board members here contend any money claimant has earned outside of his retirement pay should also be deducted. The docket does not disclose any such earnings by claimant or the claim of any by the carrier when the matter was considered on the property. However, it is contended this question is in all claims for lost pay by reason of wrongful discharge or refusal to reinstate in a disability case.

Deduction of outside earnings as this question is called has long been the subject of bitter controversy on this Division. Those against deduction assert the rule alone governs and those for contend the agreement or rule is impliedly modified by the old common law rule which is followed by most courts in civil cases which require the mitigation of damages by deduction of other earnings during the term of the contract for which lost wages are allowed.

Under the common law rule as followed by the courts in cases other than railroad claims the wronged employe may also recover consequential or special damages in addition to his lost wages.

The usual railroad schedule states the employe shall recover all wages or time lost. It does not say and other losses consequential or caused by the wrongful discharge or refusal to reinstate nor does it say less earnings he may have received from other employment. However, the carrier contends we must infer the latter and exclude the former.

Affidavit of W. T. Wallace—Exhibit "F"

Construction of contracts requires the ascertainment of the intent of the parties. What was the intent of the parties when the contracts were made? The common law rule which is followed by the courts was well known at the time the present railroad schedules or contracts were made with the employe organizations. No doubt skilled lawyers attended both parties to the agreements, and yet the contracts were silent on both consequential damages and deduction of outside earnings.

It appears from the arguments that in the early awards wrongfully discharged employes were paid lost wages or time without deduction of outside earnings and, as was stated by a carrier member of the Board, they were usually of a minor nature, only 30 or 40 days pay. Apparently it was not until they became substantial that a demand was made for deductions. Why this early practice did not establish a precedent as an expression of the intent of the parties has not been explained.

However, since the question was first raised it has constantly plagued boards and referees. Awards have been made for and against deduction of outside earnings. Each side claiming the larger number of awards in its favor.

Permitting deductions allows the wrongdoer to save himself, partially or wholly, harmless by reason of the financial necessity or industry of the injured innocent party.

Permitting deductions will tend to make over zealous or vindictive officials more irresponsible and reckless in the discharge of employes if they know they will have little or nothing to pay even if it is subsequently determined the discharge was unjustified, where the employe must seek other work to tide him over, which is the usual situation.

No railroad case covering this question has been considered by the U. S. Supreme Court.

St. Louis Railway Company vs. Booker, 5 S. W. 2nd 856 (1928) in which the U. S. Supreme Court denied certiorari

is not an affirmance of the decision below. The U. S. Supreme Court has often said the denial of certiorari does not imply affirmance or approval of the decision below.

Payment of only the wage loss does not make the employe whole if he has suffered other losses as a consequence of his wrongful discharge or refusal of reinstatement. The most important phase of this question however, is that the contract is silent on the matter of deduction of outside earnings as well as recovery of consequential damages.

In Award 5080, Referee Justice Royal A. Stone on another subject said in part:

> "The contract does not so provide. If penalty is to be awarded it must be based upon implication. Such implication as there is runs the other way, for the reason that the contract in the numerous places indicated provides for additional pay for stipulated arbitrary periods, even though the work requires much less time. *Silence of the contract concerning a minimum days pay in such cases as this is convincing that it was not intended.*" (Emphasis supplied.)

If silence in the contract in the above instance implies it was not intended why does not silence regarding deduction of outside earnings imply also it was not intended?

Allowing deductions except as to self employment as was done in Award 11463 cannot be justified. An employe may earn more when self employed than one working for wages.

The effect of Award 5862 is neutralized by the rationalization of suggested liberality towards the employe in the exercise of the principle and that he should not be held too strictly to the requirement that he seek other employment.

In Buster vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, U.S.C.A., 7th Circuit, March 1952, the

court indulged in pure unadulterated obiter dictum regarding deduction of outside earnings. The only question submitted to the jury was whether the discharge was just. The jury said no. The court set the verdict aside and entered judgment for the defendant. The sole question on appeal was whether the plaintiff had a fair hearing. The Circuit Court said he had a fair hearing. Then without any necessity of or requirement for such comment the court gratuitously added its views on the question of damages.

The only purpose it could serve was to minimize the harshness of the court's decision in substituting its judgment for that of the jury.

To allow deductions for outside earnings adds something to a written rule it never contained and which the parties never contemplated when it was written. The early awards in which deductions were not allowed strongly support this view. To now inject this into the rule puts a premium on idleness, encourages irresponsibility in discharge or reinstatement matters, and produces unfair, unjust, and discriminatory results.

Disallowance of deductions for outside earnings is not a penalty on the carrier as it pays no more than it contracted to pay. The loss of work is caused entirely by its own deliberate wrongful act of discharging its employe without good cause or refusing to reinstate when so required.

Award: Claim sustained without deduction of outside earnings, if any, less payments to Retirement Fund.

National Railroad Adjustment Board
By Order of First Division
Attest: J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois
this 8th day of August, 1952.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "G".

Award No. 12629
Docket No. 23125

First Division

NATIONAL RAILROAD ADJUSTMENT BOARD

39 South La Salle St., Chicago 3, Illinois

The First Division Consisted of the regular members and in addition Referee George W. Blattner when award was rendered.

Parties To Dispute:

Order of Railway Conductors
Louisville and Nashville Railroad Company

Statement of Claim: Request for reinstatement of Conductor W. W. Fisher LC&L Division of the Louisville and Nashville Railroad, and pay for time lost account of disqualified and taken out of service on September 30, 1947.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employ or employes involved in this dispute are respectively carrier or employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived hearing thereon.

This is a claim for reinstatement of conductor Fisher and pay for time lost because of being taken out of service on account of high blood pressure on September 30, 1947.

This Division is confronted in this case with conflicting medical evidence. The company physician found the claimant, 67 years of age, to be unfit for service because of high blood pressure, while examination by specialist on more

than one occasion over a span of weeks found him to have a much lower blood pressure than that found by the company doctor and declared the claimant fit for service. This Division is obviously not expert in medical matters and cannot reconcile this conflicting testimony. In other cases, this Division has returned the docket to the property to have an unbiased medical board review the situation and conduct a new examination. We so direct in the instant case.

If the reviewing board finds the claimant fit for duty, the claim is sustained for reinstatement with pay for time lost reduced by outside earnings, if any. Back pay shall begin from such date as the reviewing board finds the claimant was in fact fit for service. If the reviewing board finds claimant has been and continues to be unfit for service, claim is denied. The reviewing board will consist of one doctor appointed by carrier, one by claimant or his representative, and the third doctor to be chosen by the two other doctors indicated.

Award

Claim disposed of in accordance with findings.

By Order of First Division
National Railroad Adjustment Board
Attest: (Sgd.) T. S. McFarland,
Executive Secretary.

Dated at Chicago, Illinois, this 14th day of February, 1949.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "I".

Award No. 3512
Docket No. 6160

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division

The First Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

Parties To Dispute:

Brotherhood of Locomotive Engineers
The New York, Chicago and St. Louis Railroad Company
(Clover Leaf District)

Statement of Claims: Claim of Engineer A. Z. Metcalfe for reinstatement to full seniority and pay for time lost, account dismissed from service account alleged violation of Rule "G", February 22, 1937. Date of dismissal March 13, 1937.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

It is admitted that there was a mild Rule "G" violation but the evidence does not warrant the conviction that the condition of incapacity indicated was intoxication and the

circumstances rather negative it. Accordingly it is the conclusion that the discipline administered was excessive especially in the light of the engineer's thirty-two year record without similar charge.

It is considered that that end would be adequately subserved by restoring him to duty, seniority unimpaired but with pay for one-half time lost.

Award

Claimant to be reinstated seniority unimpaired with pay for half the time lost.

National Railroad Adjustment Board
By Order of First Division
Attest: (sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 15th day of February, 1939.

AFFIDAVIT OF W. T. WALLACE—EXHIBIT "J".

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Director of Personnel
Louisville, Kentucky

November 16, 1951
File J-226-14

Mr. J. M. McLeod, Executive Secretary,
First Division,
National Railroad Adjustment Board,
39 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

Please refer to your letter of September 21, 1951, file L-1042, in connection with ex parte submission filed by General Chairman Pemberton, Order of Railway Conductors of America, in request that Conductor T. C. Smith be permitted to return to service and that he be paid for time lost beginning with April 1, 1951. On October 16 the Carrier was granted an extension of thirty days to November 23, 1951, for the filing of answer to the Employes' submission. Following is the Carrier's answer to the Employes' submission, copy of which is being furnished General Chairman Pemberton.

CARRIER'S STATEMENT OF FACTS:

Claimant T. C. Smith, born January 2, 1891, entered service of Carrier as flagman October 27, 1909 and was promoted to conductor September 28, 1912.

Mr. Smith last worked on December 31, 1946, following which he voluntarily retired account of his physical condition and made application for disability annuity under the Railroad Retirement Act. At the time of his retirement

Affidavit of W. T. Wallace—Exhibit "J"

Mr. Smith submitted the following letter dated December 31, 1946 from his personal physician, Dr. William D. Nobles, who is also the Carrier's District Surgeon at Pensacola, Florida:

"Mr. D. E. Beatty,
Supt., L&N RR Co.,
Mobile, Ala.

Dear Sir:

"I have been treating Mr. Chester Smith for the last twenty years and he has had two or three serious operations. He complains of a general weakness, and I may state that he is minus one kidney, has chronic bronchitis, chronic sinus trouble and an enlarged heart. Any of these conditions, I consider incapacitate him for further duty as conductor.

"Trusting that this is the desired information you wish regarding Mr. Smith, I am."

On February 25, 1947, Smith advised the Railroad Retirement Board that he had accepted a supervisory position with the Waterman Steamship Company, Mobile, Alabama, as of that date. On March 12, 1947, he advised the Railroad Retirement Board that his connection with the Waterman Steamship Company in the supervisory capacity was terminated as of March 11, 1947, and he desired that his application for annuity be processed to a conclusion. Disability annuity was subsequently awarded Mr. Smith by the Railroad Retirement Board.

In May, 1947, it was brought to attention of the Management that Mr. Smith was not satisfied with the amount of annuity he was receiving from the Railroad Retirement Board. On November 4, 1947 Mr. Smith advised the division officials he desired to return to work. He was sent to

Affidavit of W. T. Wallace—Exhibit "J"

Dr. W. D. Nobles, District Surgeon, Pensacola, for examination, and on November 6, 1947 Dr. Nobles made the following report to Division Superintendent Black:

"Dear Mr. Black:

"Replying to your letter of November 5th, regarding Mr. T. C. Smith, former conductor of the L&N Railroad Company, I am enclosing a report from Dr. John J. McGuire, Radiologist, and also a report from Dr. J. N. McLane, E.E.N. & T. Specialist, both of whom examined Mr. Smith.

"I have again examined Mr. Smith and am still of the same opinion as I was on the date I wrote Mr. Beatty. I perhaps know Mr. Smith better than any other doctor as I have been treating him off and on for the last twenty five years.

"He was brought in from up the road some ten years ago with a ruptured appendix. I operated on him and had to put several drains in at this time. At the time I did not have much hope for him but he was fortunate enough to get better but due to the fact that I had to put these large drains through the abdominal wall, it naturally became weakened. Since then, some five years ago, he came to me with a very much enlarged testes which I was apprehensive of it being malignant. I removed the testicle with a positive report of it being tubercular. Some two years ago he came to me again having trouble with the left kidney. I was suspicious of the tuberculis infection and I sent him to Dr. Sharp, the kidney specialist. Dr. Sharp removed the left kidney with a report that it was also tubercular. He has some trouble with his heart, has bronchitis, and at times suffers with sinus trouble. Now, you have a man who looks very well but these are facts concerning

him. He is minus a kidney and one testicle both with a tuberculis report, and you can readily see that he is not able to do any laborious work.

"You mention the fact that Mr. Smith wants to go back to work. Well, it is my desire to do all that I can do for him but knowing his condition, I am afraid that Mr. Smith will be unable to do laborious work. However, I am willing to qualify him for passenger service only, and to be re-examined every six months."

Reports from Dr. John J. McGuire and Dr. J. N. McLane, referred to by the District Surgeon in his letter quoted above are attached as Carrier's Exhibits "AA" and "BB". In view of the report of District Surgeon Noble as to Mr. Smith's physical condition the request that he be permitted to return to work was declined.

In December, 1947, March, 1948 and November, 1948 further requests were made that Mr. Smith be permitted to resume work as conductor. However, in view of the medical history as related by Dr. Nobles, the Management did not consider it safe to permit him to do so and the requests were declined.

On April 5, 1951 General Chairman Pemberton of the Conductors' Organization wrote the Director of Personnel advising that during the time Smith had been out of service he had undergone two or three operations but at that time felt he was able to return to work as conductor. With that letter Mr. Pemberton submitted letters of March 28, 1951 from Dr. Lee Sharp and March 30, 1951 from Dr. J. P. Daniels concerning Mr. Smith's condition. Those letters are quoted on pages 7 and 10, respectively, of the Employes' submission. While these doctors gave as their opinion that Mr. Smith was able to resume work, and the Organization contended his condition was much improved since his retirement in 1947, it was evident he had con-

tinued to have trouble physically for according to Dr. Sharp's letter he was forced to undergo an operation as late as December, 1950 for removal of remaining testicle account of tubercular infection.

In the circumstances Management continued to decline the request that Smith be permitted to resume active service, but at the insistence of the Organization did agree to have him examined again at the hands of one of its District Surgeons. This further examination was made by District Surgeon G. G. Oswalt, Mobile, Alabama, on July 13, 1951 and copy of his report is attached as Carrier's Exhibit "CC". While Dr. Oswalt did not find any disqualifying defects, it is evident Mr. Smith did not give him a full and complete history of his case as Dr. Oswalt said, "Left kidney and both testicles removed for tuberculosis more than 5 years ago" whereas the last operation for removal of testicle had been performed only seven months before or in December, 1950. In view of the reports from Dr. Nobles, who has treated Mr. Smith for the last 25 years or more and is thoroughly familiar with his physical condition, the Carrier was unwilling to assume the responsibility of permitting him to resume the important duties of a train conductor, and declined to permit him to do so.

POSITION OF CARRIER:

There is probably no class of railroad employment where the responsibility for life and property is greater than in the operation of trains. Because of the nature of their work, it is imperative that employes in train service be in such physical condition as to be able to meet any situation that may arise. The members of this Board are, of course, familiar with the duties and responsibilities of a conductor. The general direction and government of a train is vested in the conductor, and he, along with the engineman, is responsible for the protection of his train.

Affidavit of W. T. Wallace—Exhibit "J"

In any situation that may arise the conductor is in charge. In the performance of his duties he is called upon to exert himself in many ways. In the absence of a flagman, on a passenger train, the conductor must take the place of the flagman. It is not difficult to visualize what could happen in the case of a conductor not being able, due to his physical condition to properly and safely protect his train in case of emergency. The result could be disastrous.

The attention of the Board is invited to the following excerpts from testimony introduced by the organization in proceedings before Arbitration Board (National Mediation Board Docket No. A-2215, ARB. 61) at Chicago, Illinois, in wage increase case, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, and Switchmen's Union of North America versus designated railroads, including the Louisville and Nashville Railroad, the arbitration proceedings commencing on February 18, 1946.

J. B. DeLahunty, passenger conductor on the Chicago and North Western Railroad and Local Chairman of the Order of Railway Conductors on that road, testified in part:

> "Every conductor is in full charge of the operation of his train and he is fully responsible for every member of his crew.
>
> . . . . . .
>
> "After departure of the train I am held responsible and must see that all members of my crew perform all duties and train order instructions required of them by train orders, rules or special instructions, and also for the safety of the train and its passengers, from the time of departure until arrival at the final terminal.
>
> . . . . . ."

Affidavit of W. T. Wallace—Exhibit "J"

J. V. Tillman, General Chairman of the Conductors' Organization on the Mobile & Ohio Railroad, testified in part:

> "After beginning his trip he (conductor) is entirely responsible for the safety of movement of the train and all its passengers. . . . He becomes a doctor, officer of the law, and a diplomat, among some several hundred people of every type and character, who are placed in his care. While doing this work, none of his responsibility has been relaxed—he must know that Orders and Special Instructions governing the safety of his train are fully observed by each and every member of his crew, and when passing stations he must be on the alert to observe position of train order board, receive train orders and messages, whether passing at high speed, or standing. Any failure in the discharge of these duties may mean death or severe injury to many people, as well as great loss of property.
>
> . . . . . ."

It is the Carrier's responsibility to the public, to its employees, and to itself to see that men who are in charge of its trains are not in such physical condition as would render them unable to properly perform all their duties. According to the reports of Dr. Nobles, who has been Mr. Smith's personal physician for more than 25 years, he has had several serious operations over the years including those for a ruptured appendix, removal of one kidney and both testicles, all of which has resulted in a general physical weakness. The Doctor also says Mr. Smith has some trouble with his heart which is enlarged, has bronchitis, and at times suffers with sinus trouble. The statements of other doctors who have examined Mr. Smith might indicate he would be able to ride safely on passenger trains and take care of routine duties such as lifting trans-

portation, checking train order boards, etc. On the other hand, it is abundantly clear he would not, because of his physical condition, be able to render appropriate service for the protection of his train and passengers in the event of unusual occurrences which may reasonably be expected in the operation of trains such as mechanical failure of the locomotive or equipment between stations, trains breaking in two, journals running hot, emergency flagging in the absence or illness of flagman, or numerous other similar occurrences.

Further, Carrier points out the fact that Mr. Smith has been, and still is, receiving disability annuity under the provisions of the Railroad Retirement Act. Section 2(a), paragraph 5, of that Act reads in part as follows:

> "Such satisfactory proof shall be made from time to time as prescribed by the Board, of the disability provided for in paragraph 4 or 5 and of the continuance of such disability (according to the standards applied in the establishment of such disability) until the employee attains the age of sixty-five. If the individual fails to comply with the requirements prescribed by the Board as to proof of the continuance of the disability until he attains the age of sixty-five years, his right to an annuity by reason of such disability shall, except for good cause shown to the Board, cease, but without prejudice to his right to any subsequent annuity to which he may be entitled. If before attaining the age of sixty-five an employee in receipt of an annuity under paragraph 4 or 5 is found by the Board to be no longer disabled as provided in said paragraphs his annuity shall cease upon the last day of the month in which he ceases to be so disabled. An employe, in receipt of such annuity, who earns more than $75 in service for hire, or in self-employment,

in each of any six consecutive calendar months, shall be deemed to cease to be so disabled in the last of such six months; and such employee shall report to the Board immediately all such service for hire, or such self-employment. If after cessation of his disability annuity the employee will have acquired additional years of service, such additional years of service may be credited to him with the same effect as if no annuity had previously been awarded to him."

The fact that Mr. Smith is receiving an annuity under the above quoted provision of the Act is certainly ample evidence of his continuing disability. Certainly he is not on good grounds in insisting on the one hand that he is able to resume his duties as conductor, and asking that he be allowed pay because the Carrier has declined to permit him to do so, and on the other hand accepting annuity payments from the Railroad Retirement Board based on the fact that he is physically unable to perform his usual duties.

As anyone familiar with the operation of trains and the duties of a conductor well knows, and as pointed out herein, the position of train conductor is a most important one involving the safety of passengers and employes as well as protection of property. Knowing Mr. Smith's condition, and the disaster which easily might result in the event he was unable to meet emergency conditions, the Carrier cannot assume the responsibility, which the Organization would have it assume, of permitting him to return to active service. Likewise, the Carrier does not feel that the Board will assume the responsibility, which the Organization is now asking it to assume, of ordering the return of Mr. Smith to active service.

Affidavit of W. T. Wallace—Exhibit "J"

All factual data submitted in support of Carrier's position has been presented to duly authorized representative of employes.

Oral hearing not desired by the Carrier.

Respectfully submitted,

(s) G. C. Howard,
Director of Personnel.

Copy—Mr. O. K. Pemberton, General Chairman,
Order of Railway Conductors of America,
904 Republic Building,
Louisville, Kentucky.

CARRIER'S EXHIBIT "AA".

November 5th, 1947

Dr. W. D. Nobles
Nobles Building
Pensacola, Florida

Dear Dr. Nobles:

Re: Mr. T. C. Smith
420 E. Gregory
Pensacola, Florida

The above patient consulted me on this date, for an examination of his eyes, ears, nose and throat, and my report is as follows:

Nose: Markedly deviated nasal septum, but with good airways.

Sinuses: Clear upon transillumination.

Tonsils: Red and infected.

Ears: The right ear, shows a large perforation of the drum, but there is no discharge at this time. The left ear was normal upon examination. He shows a loss of

20 decibels in hearing in the left ear, and a loss of 40 decibels in the right ear. His hearing shows a loss of 16% in the left ear, and 32% in the right ear.

Eyes: His vision was 20/20 in the right eye, and 20-20-1 in the left eye, with correction. Vision without glasses was 20/40 in either eye. Tension in either eye was 28. Fundi examination was normal except for rather markedly physiological cupping of the discs.

Hoping this is the information you desire, I am

Sincerely,

(s) J. N. McLane, M.D.

CARRIER'S EXHIBIT "BB".

Subject: Mr. T. C. Smith

November 5, 1947

W. D. Nobles, M.D.
Nobles Building
Pensacola, Florida

Dear Dr. Nobles:

Following is the report of the x-ray examination of your patient, Mr. T. C. Smith, made on November 4, 1947.

Chest: "Largest transverse diameter of the heart is 17 cm; of the ascending aorta 8 cm.; of the aortic arch 9 cm. There is some calcification in the walls of the aorta consistent with an aortitis. The lung fields are normal."

Thank you for this reference.

Sincerely,

(s) John J. McGuire, M.D.

JJMcG/p

Affidavit of W. T. Wallace—Exhibit "J"

CARRIER'S EXHIBIT "CC".

LOUISVILLE & NASHVILLE RAILROAD COMPANY

Report of Physical Examination

Name T. C. Smith Residence 420 E. Gregory St., Pensacola, Fla. Occupation Cond.

Division Age 60 Color w Height 5'9" Weight 213 Hair Grey Eyes Grey

Married Or Single Married Scars or Marks Kidney scar—appen. scar.

Ever Receive Any Injury no Date Kind

Any Evidence of Rupture no

Hemorrhoids Or Fistula no

Varicose Veins no Varicocele Or Hydrocele no

Deformity Of Any Kind both testicles removed Skin neg

Heart neg Pulse 74 Lungs neg Vaccination yes Blood Pressure 140/86

Any Indication Of Disease Of The Heart Or Blood Vessels no

(See below)

Tuberculosis Or History Of yes Epilepsey, Spasms, Fits no Alcohol Or Drug Addict no

Syphilis Or History Of no Genito-Urinary see below

Urinary Analysis: Color amber React acid

Specific Gravity 1018 Albumen neg Sugar neg

Females, Single, Married, Widow Pregnant Functions Miscarriage

Remarks: Note Any Condition Not Covered Above And Say Whether Applicant Qualified Or Disqualified With Reasons For Latter.

Affidavit of W. T. Wallace—Exhibit "J"

Eyes: Lt.20/50 Rt. 20/20 with glasses
Eyes: Lt.20/30 Rt. 20.25 Without Glasses
Ears: Rt. 10/10 Lt. 10/10
Remarks: Left Kidney and both testicles removed for tuberculosis more than 5 years ago. Fail to find anything in physical condition to reject.

Place Mobile, Ala. Date 7/13/51

(Sgd) C. G. Oswalt
Surgeon

AFFIDAVIT OF J. B. CLARK.

Affiant, J. B. Clark, states that he is a resident of Louisville, Jefferson County, Kentucky, and is now Chief Engineer of the Louisville and Nashville Railroad Company, and that he served as Assistant Director of Personnel from August 1, 1955 until April 1, 1959, during which time he was off the railroad continuously from February 1, 1959 until April 4, 1959. Prior to August 1, 1955 he served in various capacities on the railroad, none of which involved work in the Personnel Department. During the time he was Assistant Director of Personnel he represented the Management in conferences with the representatives of the various labor organizations when such conferences dealt with discipline. Mr. W. T. Wallace was present and assisted in most of the conferences concerning discipline.

He states that he is entirely familiar with the handling of the B. G. Humphries case from the time that Mr. Humphries was discharged until February 1, 1959, when the affiant left active service in the Personnel Department.

Mr. Humphries was discharged from the service of the carrier on March 31, 1956, for assaulting two other employes who were on duty. Following the discharge of Mr.

Humphries, the affiant and Mr. H. R. Stewart, then Assistant to the Director of Personnel, represented the carrier in a series of conferences between December 1956 and June 1957 with representatives of the employes involving the Humphries case and certain other minor disputes which have since been settled or submitted to the National Railroad Adjustment Board. As early as February 22, 1957, the Brotherhood of Locomotive Firemen and Enginemen were threatening to strike over the Humphries case and the other minor disputes that have since been settled or submitted to the Adjustment Board.

Mr. Paschall's letter of February 22, 1957 was referred to in affiant's testimony on May 18, 1959 in the United States District Court for the Western District of Kentucky, Louisville Division. The last two paragraphs of that letter read:

> "This circular is more than a report on these disputes. It is to advise that, barring developments which at present seem unlikely, a legal strike of the Brotherhood of Locomotive Firemen & Enginemen will be fixed. Pending approval of this action by our International President, you are directed to prepare for a strike. Arrangements must be now made to establish picket-lines, etc., and other arrangements made in order to insure the effectiveness of the strike.
>
> "It is imperative that this circular be given top-priority, for when approval of the strike is given, the strike will be called on short notice. Further strike instructions will be issued as soon as they are cleared by our International President."

In an effort to orderly settle the controversy involving the Humphries case, the carrier, on June 13, 1957, submitted the dispute involving the claim of Humphries to the

National Railroad Adjustment Board for a decision, and on May 14, 1958 the decision of the Board was handed down, reading as follows:

> "Claim sustained with pay for time lost as the rule is construed on the property."

In accordance with carrier's past practice of considering outside earnings, Mr. Humphries was asked for a statement as to what his outside earnings were during the time that he was out of railroad service. This request was not unusual since it had been our practice for many years to consider outside earnings of employes when they were reinstated by the Adjustment Board by decision that did not specifically prohibit deduction of outside earnings.

Contrary to the defendants' contention that an attempt was being made to establish a new practice or to establish a new position as to the meaning of Rule 31(f) of the agreement between the Louisville and Nashville Railroad Company and its locomotive firemen and enginemen, we were simply following an established practice in asking for a statement of outside earnings.

Affiant states that he was active in the settlement of the case involving Fireman T. Y. Alston, during which handling Mr. Alston made a statement on June 21, 1955 to the effect that he had been unemployed since his dismissal in February, 1953. General Chairman Paschall of the Brotherhood of Locomotive Firemen and Enginemen, was advised of our request for a statement of outside earnings of Mr. Alston and took no issue with that handling. However, in the B. G. Humphries case, Mr. Humphries refused to make a statement as to his outside earnings and Mr. Paschall contended that we had no right to consider his outside earnings in complying with the award of the National Railroad Adjustment Board.

Affidavit of J. B. Clark

While we had no case pending with other organizations involving the question of our right to deduct outside earnings in complying with a Board award reinstating a discharged employe to service, the other three operating crafts on this railroad joined with Mr. Paschall in an attempt to force the railroad to ignore any outside earnings Mr. Humphries may have had during the time that he was out of service.

It is obvious that the other organizations entered the controversy simply to add weight to the Brotherhood of Locomotive Firemen and Enginemen in their attempt to get the railroad to comply with the award in a manner in which that organization thought the award should be applied instead of the manner in which the railroad thought the award should be applied. This contention is borne out by a letter addressed to all Local Chairmen and others by General Chairman H. J. Roadcup of the Brotherhood of Locomotive Engineers on August 4, 1958. In that letter Mr. Roadcup stated:

> "Following the unsuccessful handling of this dispute by the BLF&E, it was referred to the Chief Executives of the BLE, BLF&E, OBC&O and BRT, pursuant to an understanding between them with respect to applying NRAB awards; • • •."

A copy of the above letter dated August 4, 1958, is attached hereto marked Exhibit "A".[1]

In other words, the entire controversy concerns the application of an award of the National Railroad Adjustment Board and is confined to a case involving the Louisville and Nashville Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen.

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[1]This Exhibit is printed in this Appendix on pp. 213b-217b, *infra*.

Affidavit of J. B. Clark

In meetings between the Louisville and Nashville Railroad Company and the organizations, the affiant and Mr. W. T. Wallace maintained that, since the railroad and the Brotherhood of Locomotive Firemen and Enginemen could not agree as to the proper application of the award of the National Railroad Adjustment Board, the matter should be referred to the Board for an interpretation of the award. The representatives of the carrier believed that this was the proper procedure to follow to settle the matter in an orderly fashion. Such a procedure had been followed by the Terminal Railroad Association of St. Louis in a dispute with the Brotherhood of Railroad Trainmen in Award No. 11825, First Division, National Railroad Adjustment Board. A copy of Award No. 11825 and a copy of Interpretation of Award No. 11825 are attached hereto as Exhibits "B"[1] and "C",[2] respectively.

Since the Firemen's organization was not willing to submit the question to the National Railroad Adjustment Board, the Louisville and Nashville Railroad Company did so on September 23, 1958. The decision of the Board on December 17, 1958, was to the effect that the question submitted to them was a new issue and that they would not interpret the original award.

In our meeting with the organization's representatives on January 23, 1959, it was apparent that the organizations were not interested in submitting the new issue to the Board, but rather intended to force the railroad to comply with their contention in regard to the application of the original award by means of a strike if necessary. Therefore, the railroad company made its own submission asking that the new issue be decided by the Adjustment Board.

[1]Exhibit "B" is printed in this Appendix on pp. 218b-219b, *infra*.
[2]Exhibit "C" is printed in this Appendix on pp. 220b-222b, *infra*.

Affidavit of J. B. Clark

Since the affiant was not active in any conferences dealing with this case after January 23, 1959, he is not personally familiar with the handling after that time except for the handling in the United States District Court in Louisville on May 18, 1959 and on August 18, 1960.

(s) J. B. Clark.

Commonwealth of Kentucky }
County of Jefferson } ss.

Subscribed and sworn to before me by J. B. Clark, this 25th day of August, 1960.

My Commission expires Feb. 19, 1963.

(s) A. M. Bradford,
(Seal) Notary Public.

AFFIDAVIT OF J. B. CLARK—EXHIBIT "A".

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
Office of General Chairman
407-C Republic Building
Louisville 2, Kentucky

August 4, 1958

File: 31(Mas)

To All Local Chairmen:
Members of General Committee
of Adjustment, B. of L. E.,
L&N System

Dear Sirs and Brothers:

This refers to a dispute between the Organizations and the Carrier precipitated by the Carrier's refusal to apply

Affidavit of J. B. Clark—Exhibit "A"

National Railroad Adjustment Board, First Division, Award No. 18720, covering the following BLF&E Claim:

> "Request that Fireman B. G. Humphries, Louisville Main Stem First Division, be reinstated to service with former seniority unimpaired and paid for all time lost. Art. 31."

In this Claim the Division held as follows:

> "AWARD: Claim sustained with pay for time lost as the rule is construed on the property."

Article 31(f) of the BLF&E Schedule (also the ELE, ORC&B and BRT), reads as follows:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Following receipt of the Award, the carrier reinstated Fireman Humphries to service, however, he has not been paid "for any time lost". The Carrier insists that his outside earnings be deducted from the money due him under the Award. The carrier's position is stated in its letter dated June 28, 1958, to General Chairman Jake Paschall, as follows:

> "Never has a discipline rule under any agreement this Carrier has with its various classes of employees, including Article 31 of the Firemen's Agreement, been construed on the property as prohibiting deduction of outside earnings. . . ."

The carrier's position is utterly implausible and insupportable as a matter of contract and past practice, indeed, in the Findings in Award No. 15655 on this carrier, it is stated:

Affidavit of J. B. Clark—Exhibit "A"

"To allow deductions for outside earnings adds something to a written rule it never contained and which the parties never contemplated when it was written. The early awards in which deductions were not allowed strongly support this view. To now inject this into the rule puts a premium on idleness, encourages irresponsibility in discharge or reinstatement matters, and produces unfair, unjust and discriminatory results.

"Disallowances of deductions for outside earnings is not a penalty on the carrier as it pays no more than it contracted to pay. The loss of work is caused entirely by its own deliberate wrongful act of discharging its employ without good cause or refusing to reinstate when so required."

which award the Louisville and Nashville Railroad Company has applied without contending there should be any deduction of outside earnings.

Following the unsuccessful handling of this dispute by the BLF&E, it was referred to the Chief Executives of the BLE, BLF&E, ORC&B, and BRT, pursuant to an understanding between them with respect to applying NRAB Awards; and in accordance with instructions from the Chief Executives, the officers and general chairmen of the respective organizations jointly met with the carrier representatives on July 30, 1958; again requesting that the Award be fully applied, i. e., that Fireman Humphries be paid for "any time lost by him", and without deducting his outside earnings. Which request the carrier again adamantly rejected.

The matter of properly applying NRAB awards on the railroads is of vital importance to the employes represented by our organization. Therefore, in accordance with the

provisions of Section 17(a), Standing Rules, G.I.D. Constitution and By-Laws, reading in part as follows:

> ". . . The Engineers on every railroad shall settle their grievances with their own General Committee of Adjustment, if possible. Failing to do so, they may call on the Grand Chief Engineer who, in conjunction with the majority of the Committee, shall have full power to give permission to poll the road; but after such permission has been granted, the Engineers on the road shall decide whether they will quit work or not, by a majority vote of all of the members employed on the system where the trouble exists, subject to the approval of the Grand Chief Engineer, and if it is decided to quit work they shall be sustained by the organization . . ."

please indicate on the attached ballot whether or not you approve of submitting the question to the B. of L. E. membership on this property. Please mark an "x" to indicate your vote, and return the ballot to this office by Monday, August 10, 1958. This does not require action of Division.

Yours fraternally,

(s) H. J. Roadcup,
General Chairman.

Approved:

(s) H. W. Haskins, A.G.C.E.

HJR:MB

cc:—All Secretaries—For Division Record

Affidavit of J. B. Clark—Exhibit "A"

BALLOT

Date _____

I have carefully reviewed your letter of August 4, 1950 and I hereby cast my vote:

( ) FOR
( ) AGAINST

authorizing the spreading of a strike ballot to the membership of the Brotherhood of Locomotive Engineers, Louisville & Nashville System, including forme N. C. & St. L. Districts.

Yours fraternally,

_____

Local Chairman,
Division No. _____

AFFIDAVIT OF J. B. CLARK—EXHIBIT "B".

Award No. 11825
Docket No. 18367

First Division
NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

The First Division consisted of the regular members and in addition Referee Leverett Edwards when award was rendered.

Parties To Dispute:

Brotherhood of Railroad Trainmen
Terminal Railroad Association of St. Louis

Statement of Claim: Claim of Switchman (Yardman) G. M. Sauerhage, of the CD District, East St. Louis, Illinois, for reinstatement to the service with full seniority rights unimpaired and with pay for all time lost, all dates held out of service, and for all dates he has not been paid, while out of service, the same compensation that he would have earned on his assignments, which were filled by others and Junior Yardmen, which were, because, Yardman Sauerhage was unjustly suspended and dismissed from service, in violation of the Current Agreement, The Railroad Labor Act. The law providing cabooses on the IC RR. Delivery Run out of CD Yards, Illinois Commerce Commission Order dated February 1, 1940, United States Supreme Court Decision, dated January 18, 1943, which confirmed the Commission's Order and Memorandum Agreement dated May 3, 1943, which provided for the use of all cabooses on hand among other things. And, because he is unjustly being refused payment and held out of service. And also, request his record be cleared of all blame and charges when paid and reinstated.

Affidavit of J. B. Clark—Exhibit "B"

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

We find from a careful consideration of the entire record that action of the Carrier herein complained of was unjustified. Carrier acted hastily and in an arbitrary manner.

Award

Claim sustained. Switchman (Yardman) G. M. Sauerhage reinstated in his position with seniority rights as though he had not been discharged, and to be compensated for loss of earnings during the time held out of service.

By Order of First Division
National Railroad Adjustment Board
Attest: (Sgd.) T. S. McFarland,
Executive Secretary.

Dated at Chicago, Illinois, this 15th day of December, 1947.

AFFIDAVIT OF J. B. CLARK—EXHIBIT "C".

Interpretation of Award No. 11825
Docket No. 18367

First Division

NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle Street, Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee Leverett Edwards when interpretation was rendered.

This matter now comes before the Division upon the request of Carrier for an interpretation of award previously made.

It appears, partly from the docket before us and partly from the request for interpretation, that Switchman (Yardman) G. M. Sauerhage was notified of his dismissal by letter dated January 8, 1944; entered the employ of Alton and Southern Railroad on January 11, 1944; was reinstated in service of Terminal Railroad Association of St. Louis by this Division December 15, 1947.

Under date of February 12, 1944, Carrier had offered in letter addressed to Mr. C. J. Jenkins, General Chairman, B. of R. T., St. Louis, to reinstate Sauerhage on a leniency basis. Same offer was made in letter addressed by Carrier to Sauerhage under date of February 22, 1944. The claimant being in the employ of Alton and Southern Railroad by these dates, did not accept; and of course was not obligated to do so.

Under date of January 2, 1948, following our award in this case, Carrier notified Sauerhage by letter of his reinstatement. It does not appear however, that claimant has

reentered employ of Carrier, and presumably continues in the service of Alton and Southern Railroad.

It appears that Mr. Sauerhage has earned wages from the Alton and Southern Railroad between dates January 11, 1944, and January 2, 1948, in the total amount of $14,359.20.

We interpret the award to mean that claimant be reinstated in his employment with Carrier, with seniority rights unimpaired, and to be made whole against any financial loss directly and proximately resulting from the action of Carrier in discharging said employe.

In the light of all the facts and circumstances of this particular case, we further interpret the award as requiring that the sums due Mr. Sauerhage shall be computed by first ascertaining the amount of wages, straight and overtime, paid the switchman who took Mr. Sauerhage's place during the time held out of service; deduct from this figure the amount of wages earned by the claimant from Alton during said period, January 8, 1944, through January 2, 1948.

Balance remaining shall be paid to Mr. Sauerhage in satisfaction of money portion of said award; it being the further interpretation of the Division, however, that if claimant shall be able to exhibit to Carrier that he has been put to special expense such as additional carfare, cost of finding new employment, cost of other equipment required, etc. or other expenses for which credit is generally given under rules applicable to measurement of damages for breach of employmnt contracts, then Sauerhage shall be reimbursed in addition for such items.

The foregoing interpretation of the award requires a mathematical computation which this Division is obviously not able to make for lack of facts; but same can easily be made by the parties on the property. If unable to agree,

claimant has the right to an accounting and enforcement by court procedure.

By Order of First Division
National Railroad Adjustment Board
Attest: (Sgd.) T. S. McFarland,
Executive Secretary.

Dated at Chicago, Illinois, this 27th day of February, 1948.

AFFIDAVIT OF H. R. STEWART.

Affiant, H. R. Stewart, states that he entered the service of the Louisville and Nashville Railroad Company on June 16, 1922; that during the first 19 years of his service he was employed at various points on the railroad in several different positions; that in May, 1941, he was transferred to the Transportation Department at Louisville, Kentucky; that on January 1, 1942, he was appointed Staff Assistant in the Personnel Department; that on January 1, 1947, he was appointed Assistant to Director of Personnel; that on April 16, 1960, he was appointed Assistant Director of Personnel; that during the more than eighteen years he has been employed in the Personnel Department, he has been engaged primarily in the handling of claims and grievances arising under agreements with the engineers, firemen, conductors, and trainmen, in the negotiations of revisions of such agreements on a property level, and in the processing of requests for revisions of such agreements on a national basis.

Affiant further states that he is familiar with the handling of the case of B. G. Humphries; that he and J. B. Clark, then Assistant Director of Personnel, jointly represented the carrier in a series of conferences with represen-

tatives of the employes on a docket of cases which included the case of B. G. Humphries, beginning in December, 1956, and ending in June, 1957; that carrier's insistence upon deducting his earnings in other employment while he was out of the service of the Louisville and Nashville Railroad Company in computing payment for time lost is in keeping with this carrier's practice of considering other earnings in such circumstances; that the dispute involves an interpretation of Article 31(f) of the agreement between the company and its employes represented by the Brotherhood of Locomotive Firemen and Enginemen, and that it is not an attempt to "unilaterally work a change in the contract." It is simply insisting upon paying Fireman Humphries under the existing agreement for time lost "as the rule is construed on the property" as ordered by the National Railroad Adjustment Board, First Division, in Award 18720.

Affiant is thoroughly familiar with the notice served by the Louisville and Nashville Railroad Company on Mr. J. N. Hatcher, General Chairman, Brotherhood of Locomotive Engineers, Mr. O. K. Pemberton, General Chairman, Order of Railway Conductors, Mr. L. E. Whitler, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, and Mr. C. J. McClain, General Chairman, Brotherhood of Railroad Trainmen, on June 20, 1947, in accordance with the provisions of the Railway Labor Act, and with the notice served on the Louisville and Nashville Railroad Company by the aforesaid General Chairmen on June 20, 1947, of their desire to change the current respective agreements to become effective July 20, 1947, to the extent indicated by proposition attached to and made a part of their notice.

Affiant was aware from the beginning that the June 20, 1947, proposals of the railroad and the labor unions were formulated on what is known in the industry as a national

basis and that, in all probability, they were destined for negotiation on a national basis, the notice from the General Chairmen of the labor unions having contained the following request:

> "This request is being presented on all other railroads on this date, and it is desired that reply to our Proposition be made in writing to the undersigned General Chairman on or before July 1, 1947, concurring therein, or fixing date within the provisions of the Railway Labor Act, when conference with you may be had for the purpose of discussing this Proposition.
>
> "In event settlement is not reached in conference, it is requested that this company join with other companies in authorizing a national conference committee to represent them in dealing with the subject."

See Exhibit A,[1] attached hereto.

No agreement having been reached in conference on the property, on September 2, 1947, the Louisville and Nashville Railroad Company authorized its representation by a Southeastern Carriers' Conference Committee which had been formed by the railroads in the southeast to work with similar committees from the east and west in the handling of the proposals on a national basis.

Affiant is thoroughly familiar with Item 18 of Carriers' Attachment "A" to its notice of June 20, 1947, reading:

> "18. PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS
>
> "Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due.

[1]This Exhibit is printed in this Appendix at pp. 230b-231b, *infra*.

"For the purpose of this rule self-employment shall not be considered as 'other employment.'

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated.

"Where no rule, regulation or interpretation as to the above proposal exists on this carrier, the fact that the subject matter is included in this uniform proposal is not to be construed as an admission to the contrary."

(This is a complete quotation of Item 18, which is not completely quoted in Paschall's Affidavit, page 15, the last paragraph having been omitted.) Affiant is also thoroughly familiar with the proceedings that followed on a national basis, he having participated in the preparation of testimony and exhibits for presentation to an Emergency Board in that eventuality.

Affiant states that by national agreements of November 21, 1947, December 12, 1947, and December 18, 1947, the rules issues between the railroads and their employes represented by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen were settled. 193 railroads were parties to the agreements. While negotiations between the Carriers' Conference Committee and the National Committees of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America resulted in some of the issues being withdrawn, such negotiations and mediation by the National Mediation Board failed to dispose of 13 of carriers' rules proposals and 22 of the unions' rules proposals, and on January 27, 1948, the President of the United States, by Executive Order No. 9929, created an Emergency Board by virtue of the authority vested in him by Section 10 of the Railway Labor Act, as amended, to

investigate the said dispute. The Emergency Board, consisting of Dr. William M. Leiserson, Chairman, Judge George E. Bushnell, Chief Justice of Supreme Court of Michigan, Member, and W. Willard Wirtz, Professor of Law, Northwestern University, Member, began hearings in Chicago, Illinois, on February 2, 1948. 199 American railroads were parties to the proceedings.

One of the unsettled requests that was submitted to the Emergency Board was Item 18 of Carriers' Attachment "A" entitled "PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS". During the hearing before the Emergency Board on March 4, 1948, Carriers' Witness C. D. Mackay, Assistant Vice President of the Southern Railway, after having been duly sworn (page 5674 of the Transcript of Proceedings) explained the reason for carrier's request for Item 18 as follows:

> "At the present time there are various rules in the agreements requiring Carriers to pay employees for time lost—the most common rules being those relating to discipline, the wording of which has now been found to be inadequate because some of these rules have been construed to require the Carriers to pay the employees who have been wrongly held out of service, the full amount they would have earned in their regular employment had they been permitted to work, irrespective of amounts earned by such employees in other employment while out of railroad service.
>
> "The proposal is designed to correct such erroneous interpretations—by providing that where payments are to be made for 'time lost,' regardless of the reasons therefor, earnings made in other employment during the time the employee is out of service shall be deducted." (Pages 5782 and 5783 of the Transcript.)

* * * * * * * *

Affidavit of H. R. Stewart

"For many years these rules were applied to mean that pay for 'time lost' meant actual loss and that earnings in other employment should be deducted in determining the actual loss sustained by the employe. (See Railway Board of Adjustment No. 1 decisions 126, 1239, 1433, 1694, 2271, Appendix B and First Division, National Railroad Adjustment Board awards 404, 428, 465, 1055, Appendix D.) In recent years the National Railroad Adjustment Board—First Division has construed some of these rules as requiring full pay for time lost regardless of outside earnings." (Page 5786 of the Transcript of Proceedings.)

A copy of Witness Mackay's testimony on Item 18 is attached as Exhibit B.[1]

Finally, on August 11, 1948, two agreements between the participating carriers and their employes represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America were executed disposing of the issues both as to wages and rules. Facsimile copy of the agreement covering wages is attached hereto as Exhibit C. Verifax copy of Memorandum of Understanding of August 11, 1948, pertaining to the wage settlement, is attached as Exhibit D. Facsimile copy of the agreement covering rules is attached as Exhibit E. 198 American railroads were parties to the rules agreement (Exhibit E).

On page 16 of the Affidavit of Jake Paschall, the present General Chairman of the Brotherhood of Locomotive Firemen and Enginemen on the L&N Railroad, he stated, "that on August 11, 1948, the unions and the railroads involved entered into a 'Memorandum of Understanding' incorporating the changes in the contracts between the unions and

[1]This Exhibit is printed in this Appendix at pp. 232b-251b, *infra*.

the railroads involved which had been agreed upon by that National Conference Committee", and he attached a "Synopsis of agreement made on August 11, 1948," as Exhibit I. Affiant knows of no such synopsis of agreement made by the parties on August 11, 1948. (It appears to be a synopsis of the two agreements of August 11, 1948, and the Memorandum of Understanding of the same date pertaining to the wage settlement, prepared by or for Jake Paschall, rather than an exact copy.)

On page 17 of his affidavit, Jake Paschall quoted what he said was Section 20 of "Memorandum of Understanding" reached by the National Conference Committee on August 11, 1948. That quotation is the same as Section 20 of the rules agreement of August 11, 1948, attached hereto as Exhibit E. Mr. Paschall did not undertake to explain the significance of such quotation. Affiant states that the sole purpose of Section 20 of the rules agreement of August 11, 1948 (Exhibit E), was to show that the handling of the Section 6 notices of both the carriers and the employes served on or about June 20, 1947, had been concluded.

Carriers' request as set forth in Item 18 of their proposals of June 20, 1947, was not granted in the rules agreement of August 11, 1948, but, based on his many years of experience in railroad labor relations, Affiant states positively that the inclusion of Item 18 in carrier's notice of June 20, 1947, was not an admission that it could not properly deduct earnings in other employment in computing pay for time lost under Article 31 of its agreements with its employes represented by the said four labor unions; that this carrier and the many other parties to this national rules case were simply trying to stop a tendency on the part of some referees sitting with the National Railroad Adjustment Board to misinterpret their existing rules; and that failure to obtain the clarification sought did not change

Affidavit of H. R. Stewart

Article 31(f) of the agreement between the Louisville and Nashville Railroad Company and its employes represented by the Brotherhood of Locomotive Firemen and Enginemen. On the contrary, it left Article 31(f) with exactly the same meaning it had prior to June 20, 1947, i. e., that earnings in other employment during time out of service shall be deducted in computing payments for time lost.

Referee Carroll R. Daugherty, in Award No. 16408, National Railroad Adjustment Board, First Division, dated Chicago, Illinois, July 24, 1953, in the claim of Brakeman E. F. Ricko, Pennsylvania Railroad, for reinstatement and compensation for all time lost, concluded his findings with the following paragraph, which confirms the position of this railroad:

> "It has been contended that, because the carriers sought from the railroad labor organizations a specific rule authorizing the deduction of outside earnings in such cases, the carriers have admitted that most present rules on the matter are to be interpreted as not allowing or authorizing such deductions. We are not persuaded that this conclusion is necessarily valid. In our opinion the most that can be inferred from this move by the carriers is that most of the present rules are so general as to be susceptible of various and conflicting interpretations."

Copy of Award No. 16408 is attached as Exhibit F.[1]

(s) H. R. Stewart.

Commonwealth of Kentucky)
County of Jefferson) ss.

Subscribed and sworn to before me by H. R. Stewart, this 25th day of August, 1960.

My Commission expires Feb. 19, 1963.

(s) A. M. Bradford,
Notary Public.

(Seal)

[1]Exhibit "F" is printed in this Appendix on pp. 252b-256b, *infra*.

AFFIDAVIT OF H. R. STEWART—EXHIBIT "A".

Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Order of Railway Conductors
Brotherhood of Railroad Trainmen

Louisville, Kentucky
June 20, 1947

Mr. G. C. Howard
Director of Personnel
Louisville & Nashville Railroad
Louisville, Kentucky

Dear Sir:

The parties signatories hereto as representatives of the employees of the Louisville & Nashville Railroad under the existing agreements between management and committees of the organizations represented by us, have been authorized under the laws and rules of procedure of these organizations to resubmit to you notice of desire to change the respective agreements by adoption of the rules set out in notices served upon management on or about July 24, 1945 which have been subject to the moratorium provisions of Agreements expiring May 25, 1947.

In accordance with the provisions of the amended Railway Labor Act and current agreements covering rates of pay, rules and working conditions of employees represented by the organizations for which the signatories hereto are authorized to act, you will please accept this as official notice of our desire to change the current respective agreements to become effective July 20, 1947, to the extent indicated by proposition attached hereto and made a part hereof.

This request is being presented on all other railroads on this date, and it is desired that reply to our Proposition

be made in writing to the undersigned General Chairmen on or before July 1, 1947, concurring therein, or fixing date within the provisions of the Railway Labor Act, when conference with you may be had for the purpose of discussing this Proposition.

In event settlement is not reached in conference, it is requested that this company join with other companies in authorizing a national conference committee to represent them in dealing with the subject.

It is our request that all lines or divisions of railway operated or controlled by the Louisville & Nashville Railroad shall be included in settlement of this proposition, and that any agreement reached shall apply alike to all such lines of railway.

Very truly yours,

(s) L. E. Whittler,
General Chairman, Brotherhood of Locomotive Firemen & Enginemen.

(s) J. N. Hatcher,
General Chairman, Brotherhood of Locomotive Engineers.

(s) O. K. Pemberton,
General Chairman, Order of Railway Conductors.

(s) C. J. McClain,
General Chairman, Brotherhood of Railroad Trainmen.

AFFIDAVIT OF H. R. STEWART—EXHIBIT "B".

Volume No. 28

TRANSCRIPT OF PROCEEDINGS
OF THE
EMERGENCY BOARD

Appointed by the President of the United States
to investigate and report on certain
differences between

Akron, Canton & Youngstown Railroad
And Other Carriers

and

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen and
Enginemen, and
Switchmen's Union of North America

} Emergency Board No. 57

Chicago, Illinois.
March 4, 1948.

WARD & PAUL
Official Reporters
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Washington 6, D. C.

National { 4266
4267
4268

* * * * * * *

(Page 5781)

The Chairman: All right, Mr. Macgill.

Mr. MacGill: Mr. Chairman, we will now pass onto the next issue, which is 34, which is the Carrier proposal entitled: Limitation on Payments for Time Lost. I believe the Exhibit 34 has been distributed.

Affidavit of H. R. Stewart—Exhibit "B"

The Chairman: Yes; Carriers' Exhibit 34: Limitation on Payments for Time Lost is now received in evidence.

(The document above referred to was received as Carriers' Exhibit No. 34, in evidence.)

Direct Examination (continued)

By Mr. MacGill:

Q. Mr. Mackay, will you please proceed with your statement on this issue?

A. The Carriers proposed that you favorably recommend the adoption of a rule to provide that when payments are made to employees for "time lost", any earnings made in other employment except self-employment during time out of service will be deducted.

Carriers' Exhibit 34 which has been offered in evidence, contains the showing of the carriers on this issue. The proposed rule found on page 1 of the exhibit reads as follows:

"18. Pay for time lost to be reduced by other earnings.

"Where payments are made for 'time lost' for any reason, any earnings made in other employment during

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time out of service shall be deducted from amount due.

"For the purpose of this rule self-employment shall not be considered as 'other employment.'

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated." The next paragraph is the saving clause.

The facts and evidence pertaining to this proposal are fully discussed in Carrier's Exhibit No. 34. The salient facts which to me are convincing proof of the equity, fairness and justice of the proposal, and compelling reasons for incorporating the rule in the schedule agreements with the employees will be covered in my testimony.

Affidavit of H. R. Stewart—Exhibit "B"

At the present time there are various rules in the agreements requiring Carriers to pay employees for time lost—the most common rules being those relating to discipline, the wording of which has now been found to be inadequate because some of these rules have been construed to require the Carriers to pay the employees who have been wrongly held out of service, the full amount they would have earned in their regular employment had they been permitted to work, irrespective of amounts earned by such employees in other employment while out

(Page 5783)

of railroad service.

The proposal is designed to correct such erroneous interpretations—by providing that where payments are to be made for "time lost," regardless of the reasons therefor, earnings made in other employment during the time the employee is out of service shall be deducted.

It is pointed out that the term "other employment" as used in the proposed rule is intended to apply whether earnings are derived from another job with the same carrier or from some other employment—but earnings from "self-employment" are not to be deducted.

The term "self-employment" is intended to mean work done by the employee for himself without emolument or compensation in money or in kind from a third person employer.

The rule now proposed by the Carriers is in principle the same as a proposal considered by the 1946 Emergency Board, but modified to meet the recommendations of that Board.

The 1946 Board said of the proposal before them (which you will find quoted at the bottom of page 2 of the exhibit), the following:

Affidavit of H. R. Stewart—Exhibit "B"

"The proposal of the carriers in this connection is meritorious. It should not, however, be construed to require an employee held out of service to seek other work for the purpose of mitigating damages should his dis-

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charge ultimately be found to have been wrongful. The nature of the employment is such that it would frequently be impracticable for a man to seek other employment pending an appeal from a dismissal. For the purpose of this rule self-employment should not be considered as 'other employment.' With these modifications, the Board recommends adoption of the proposal." It is in the record, page 1687, and it is in Carriers' Exhibit J.

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The present proposal incorporates all the suggestions made by the 1946 Board. It specifically provides that "self-employment" shall not be considered as other employment, and the Carriers do not intend that the proposal contemplates an employee seeking other work for the purpose of mitigating damages and are satisfied that its terms do not so require that it be so construed.

As stated before, cases involving payment for "time lost" usually arise out of the provisions of the discipline rules, some type of which are found in all the agreements with the engine and train service employes. These rules usually provide that employes shall not be discharged or otherwise disciplined without just cause—and if it be determined a man has been unjustly disciplined, the rules generally provide that the discipline will be cancelled and the employee paid for "time lost" or "wage loss".

Some of the agreements expressly provide for deductions of earnings in other employment—as for example the recent agreement of the B. & O. with its Engineers and

Affidavit of H. R. Stewart—Exhibit "B"

Firemen, the very employes now before this Board—which is quoted at page 3 of the exhibit.

Most agreements, however, provide merely that employes will be "paid for time lost", "paid full wages for

(Page 5786)

time lost, if any," "paid for time lost at his regular rate for each calendar day," "paid the amount he would have earned"—and similar provisions—a collection of which is found in Appendix A of the Exhibit at page 27.

For many years these rules were applied to mean that pay for "time lost" meant actual loss and that earnings in other employment should be deducted in determining the actual loss sustained by the empioye. (See Railway Board of Adjustment No. 1 decision 126, 1239, 1433, 1694, 2271, Appendix B and First Division, National Railroad Adjustment Board awards 404, 428, 465, 1055, Appendix D.) In recent years the National Railroad Adjustment Board—First Division has construed some of these rules as requiring full pay for time lost regardless of outside earnings.

In the Exhibit, the background and history of the rules and practices with respect to pay for time lost is set forth, including a review of the significant awards of various adjustment boards. The Exhibit also contains appendices setting forth the results of various controversies taken to the Adjustment Boards, and re-produce the findings and opinions of the referees and board members in the leading cases.

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For the purpose of my evidence, it will, I hope, be sufficient to point out as an illustration, the conflicting views of the referees who have decided the two most recent cases submitted to the Adjustment Board.

Award No. 11463, page 9, decided May 1, 1947, is the most recent decision of the Board in which an employe has

been ordered reinstated with pay for time lost less compensation in other employment. There the claimant was a conductor on the St. Louis, Brownsville and Mexico Ry. Co. who had been discharged effective March 11, 1944 for violation of "Rule G". That was for being intoxicated on duty. The carrier offered to reinstate the claimant, but without pay for time lost, which offer was rejected. The Board's award was:

"The claimant shall be reinstated with seniority unimpaired and compensated a minimum day for each day, March 11, 1944, to and including the date following that on which he is notified to report for work, less compensation received from all except self-employment during the same period, computed on basis of a minimum day for each day he received compensation in other employment. Claimant shall assist in making this

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award effective by furnishing the name of the employer or employers and the period between which he was so employed."

Four of the five labor members of the First Division wrote a dissenting opinion in which they said:

"The award in this docket was made by a majority consisting of the carrier members and Referee Grady Lewis. We, the minority, consisting of the labor members, did not support this award because of the deduction provision made therein and, in this respect, dissent therefrom because it is in direct contravention with settlements made by carriers and committees and decisions of prior tribunals and approximately 100 awards of this Division, covering a period of more than 25 years."

Referee Lewis also filed a sustaining opinion, which is set out in full at page 56 of Appendix D in the Exhibit. This opinion clearly shows that the award of the Board is

in accord with the well settled principles of the law of contracts and that a contrary holding would be inconsistent and unjust notwithstanding earlier awards of the Board.

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However, in Award No. 11670, made on September 8, 1947, the Referee, Thomas F. Gallagher, joined with the labor members in sustaining a claim for pay time lost without deduction of earnings in other employment.

On the question of mitigation of damages, the referee wrote a lengthy opinion to justify his disallowance of any deduction of earnings in other employment, and later filed a sustaining opinion to answer a dissent filed by the carrier members.

All of these opinions are set out in Appendix D of the exhibit beginning at Page 61.

The Chairman: They had rebuttal and sur-rebuttal in that case.

Mr. MacGill: Yes, they did.

The Chairman: All right, go ahead.

The Witness: These and other decisions of the Adjustment Board in recent years have distorted many of the rules and have resulted in prejudicing some of the carriers by requiring them to make payments for damages which not only make the employe whole, but which enable him to show an actual profit on the transaction.

It is this situation which the carriers and the 1946 Emergency Board have found unjust and inequitable,

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and which the instant proposal is designed to correct.

I would like to consider this matter from another angle: in the administration of the complex rules governing rates of pay and working conditions of employes in railroad service, situations occasionally arise which cause the em-

ployes to lose their regular turn in service and, therefore, to earn less than they would have otherwise earned.

Consequently, the agreements with the Organizations contain provisions designed to compensate employes for the loss of earnings in such situations.

For example, if a carrier keeps an employe from his regular duties to attend court, the rule often provides that he will be compensated, usually the amount he would have earned had he been permitted to continue in service, but the witness fees revert to the carrier.

Likewise, there are provisions which obligate the carrier to compensate employes for errors which deprive them of earnings, as where an employe is not called for service to which he is entitled under the agreement, or because of unjust suspension or discipline.

Such rules, however, were never intended to place a penalty on the carrier, but were merely intended to

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make the employes whole for the actual earnings loss suffered. They might be best described as "make whole", rather than penalty rules.

Certainly that was the view of the First Division in one of its earlier awards, No. 5862—see page 46, Appendix D of the exhibit—when it said that the provisions of an agreement are not different from the ordinary contract of employment under which the carrier "undertakes to protect the employe in his right to work under certain rules of seniority."

If the employe is not permitted to work when he has the right to do so, the Board said that the employe "has suffered damage thereby to the extent of the days lost," but that while the right to damage is clear, "such damage does not exist beyond the difference between what the employes would have received from the carrier and what

he actually received from other sources in the interim."

A study of the decisions not allowing earnings in other employment—see pages 12 to 14 of the exhibit—shows that the result had nothing to do with the merits of the carriers' contention, because:

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First, no board or tribunal has ever refused to permit the deduction of interim earnings because such board or tribunal was of the opinion that it was unjust or unfair or otherwise wrong to permit such deductions.

Second, some boards have refused to permit such deductions because they have felt that the contract terms compelled that result—apparently on the theory that the agreemen provided for liquidated damages to be paid in case of loss of work.

Third, other boards have refused to permit deductions purely on the basis of precedent.

Indeed, one of the referees, the Honorable Frank M. Swacker, who decided some of the First Division cases denying the right to deduct earnings under the rules, has acknowledged the merits of the carriers' position, for he was a member of the 1946 Emergency Board which recommended a rule embodying the principles of this proposal.

Now, let me point out some of the injustices done by the decisions disallowing such deductions. The following cases are cited:

In Award No. 8792, rendered November 18, 1943, the First Division sustained the claim of an employe of the B. & O. Chicago Terminal for eight hours pay each day he was out of his regular job because of an alleged

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improper dismissal.

To comply with this award he was paid $11,232.45, the full amount he probably would have earned had he re-

mained in its service—notwithstanding while out of service, he earned $7,718.87 for services with another railroad in Chicago.

The result in Award No. 10616, on page 38 of the exhibit, was even more unjust.

The claimant was employed as a fireman on the Illinois Central. After he was dismissed, he procured employment as an engineer with the Louisville and Nashville and earned $9,302.55 while in the service of that company.

This was $1,901.28 more than he would have earned had he remained in the service of the Illinois Central as a fireman.

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Nevertheless, under the Board's decision, the Illinois Central was required to pay him $7,401.27. Thus during a period of approximately two and a half years this man received a total of $16,703.82, which was $9,302.55 more than he would have received had he remained as a fireman on the Illinois Central.

In neither case was the carrier involved at fault in the suspension of the employe. In each case the carrier was acting in what is considered to be the public interest and in the interests of the service. The circumstances were not such as warranted punitive or penal payments in either case, and rules or practices compelling such results should be corrected and clarified.

There should, in my opinion, be no question in the minds of the Board but that the nature and requirements of the railroad business make it necessary for carriers to maintain a higher standard of discipline among employes than may be necessary in many other industries. All railroads have rules governing the personal conduct of employes, particularly those in train and yard service and especially in reference to the use of intoxicants. Such rules

are necessary to protect life and property, and if disastrous results are to be avoided, they must be

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strictly administered. The efforts of the carriers to enforce the latter rule, commonly known as Rule "G," has resulted in much controversy and the submission of many claims to the Adjustment Board.

The carrying out of the obligation of the carriers in respect to safe operation is combated by the zeal of the organizations for the individual who has been punished and this, coupled with the tendency of the Adjustment Board to leniency in such cases, has resulted in penalties which the carriers are unable to avoid unless they fail in their duty to maintain a proper standard of safety in their operations. The laws governing carrier operations charge them with strict accountability, not only to their passengers and the shippers of freight but to the employes themselves, and there is probably no rule which has a more direct relation to safety than the one which forbids the use of intoxicants by employes. Yet when a carrier enforces this rule by dismissal, it does so at its peril.

This is evidenced by the fact that the First Division has ordered reinstatement in 81 out of 118 Rule "G" cases. Of these 81 cases, the carriers were required to compensate the employes for lost time in 33 cases. Clearly, the carriers discharge their full liability when they make the employe whole. There is no basis for an obligation

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to pay punitive damages in such cases.

The carriers' position in this regard was well put by a witness for the Pullman Company in a case before an Emergency Board in 1945, as follows:

"At times The Pullman Company receives complaints of a very serious nature from a passenger or from other

sources against a conductor. A charge of attempted molestation of a woman passenger is one in point. On such a charge the Company feels compelled immediately to withhold the conductor from service until opportunity is afforded fully to investigate and run down the facts. * * *

"Regrettably, investigations sometimes take a considerable amount of time to complete, particularly where it is difficult to locate a complaining passenger or passengers. The Company is not wilfully and maliciously depriving a conductor of an opportunity to work but we have received a report which, if true, would reflect seriously upon the Company were we to permit the conductor to continue in operation and commit a similar offense against another passenger. In the public interest, we have no choice but to withhold the conductor from service until we can completely investigate the charge and get all the facts connected with it.

(Page 5797)

We are indeed happy if the charge is not substantiated and we are glad to restore the conductor to his run or to the extra board, should he be an extra conductor, and to compensate him for any monetary loss he may have suffered. But we believe under the circumstance the Company should not be compelled to pay another conductor for taking the place of the man withheld and also the man who has been withheld, if during the period withheld he has * * * received remuneration from other sources."

In the dismissal cases before the Adjustment Board, the Carriers have recognized that the rules require payment for time lost if the employee was unjustly dismissed and after setting forth the reasons for the action taken in each particular case they have urged the Board to follow the common law rule relating to the assessment of damages in breach of contract cases, by allowing credit for earnings in other employment.

As already shown, this rule has in many cases been followed, but it has not been followed in others, apparently depending entirely upon the individual view of a particular Referee as to whether or not existing rules provide for liquidated damages.

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Whatever may be the proper interpretation of the language appearing in existing rules, it was never intended by the Carriers that such language would provide for liquidated damages or would preclude the Carriers from deducting earnings in other employment.

However, neither the proper interpretation of existing rules, nor the intent of the parties at the time the rules were made is material to the issue which is now before you.

This Board is solely concerned with the question of what is right and just in this instance. This question resolves itself into the further question of whether carrier employees are to be treated under the law as are all other persons asserting or exercising contract rights, or whether they are to be accorded special privileges and peculiar advantages denied to all other citizens.

It is the position of the Carriers that they are entitled to the same rights and immunities under the law as other contracting parties who are charged with the nonobservance of their contract obligations.

This would appear to be particularly true in that nonobservance of contract rights asserted in cases of the kind under consideration are usually the result of efforts of carriers to carry out what they consider the best

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interests of the public and do the needful to maintain good discipline and the result is at most a question of judgment as to the guilt or innocence of the accused or whether "the penalty fitted the fault."

Affidavit of H. R. Stewart—Exhibit "B"

There is no question that under ordinary contract law the carrier would be entitled to deduct earnings in other employment in cases of the kind here involved.

No extended review of the authorities is necessary to establish this point. Particular attention is directed, however, to the following cases in that they serve to point up the equities involved in the instant controversy:

First in National Labor Relations Board v. Mackay Radio and Telegraph Company (304 U. S. 333), the Supreme Court of the United States, by Mr. Justice Roberts, reversed the Circuit Court of Appeals:

"* * * for its refusal to decree enforcement of an order of National Labor Relations Board. The order of the Board, insofar as it is pertinent to this inquiry, required the employer to 'offer the five men immediate and full reinstatement to their former positions, without prejudice to rights and privileges previously enjoyed, and make each of them whole for any loss of wages due to their discharge'."

(Page 5800)

Mr. MacGill: Are you quoting from the court there?

The Witness: Yes; I am quoting from the court there, Mr. MacGill, and that is the end of the quotation.

In passing on the contention that the order was arbitrary and capricious, the Court said, at page 348:

"* * * The order is criticized as arbitrary in that it is said to award back pay to date of reinstatement with deductions only for what was earned to the date of the order. We do not so read it, and the Board admits that credit must be given for all sums earned to date of reinstatement, and so construes the order."

In Republic Steel Corporation v. National Labor Relations Board (311 U. S. 7) it appears that the Board ordered the Company to desist from certain practices which it

determined to be unfair labor practices and to reinstate certain employees with back pay. The Board, in providing for back pay, directed the company to deduct from the payments to the reinstated employees the amounts they had received for work performed upon work relief projects and to pay over such amounts to the appropriate governmental agencies.

(Page 5801)

The Supreme Court in reviewing the case said:

"The amounts earned by the employes before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employes whole. That principle would apply whether the employes had earned the amounts in public or private employment. Further, there is no question that the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary".

There is also a universally recognized and established rule of contract law prohibiting the granting of punitive damages for breach of contract. I refer you to Restatement of the Law—Contracts, Section 452.

In this connection the Board's attention is called to the discussion of the opinions of referees in some of the cases decided by the Adjustment Board from page 20 to 22 of the Exhibit.

The material covered there will not be iterated but I should like to call the Board's attention to the decision

(Page 5802)

of the Federal District Court for Iowa in 1942 in the case of Swift v. C. & N. W., which illustrates the soundness of the proposed rule. That case involved a machinist by the

name of Swift who was in the employ of the Chicago and North Western Ry. Swift entered the employ of the railroad in 1915 as a machinist and continued in service with certain interruptions until he resigned on October 27, 1942. On April 20, 1942, the position then held by Swift was abolished, and he claimed seniority rights to a job held by a man named Runner. The railroad decided that Runner was entitled to the job and refused to let Swift exercise his alleged seniority rights.

On May 7, 1942, Swift filed a claim asking that he be allowed to take the position denied him and be compensated for loss of wages. The case was progressed to the Second Division of the National Railroad Adjustment Board which held that Swift was entitled to the work and sustained his claim without fixing the amount of loss of wages. The carrier refused to pay the award, and Swift filed suit in the Federal District Court for the Southern District of Iowa to enforce the award as provided in Section 153 (h) (sic) of the Railway Labor Act. He asked for an accounting to be made of all sums due him by the railroad.

(Page 5803)

It was shown that during the period May 7, 1942, to October 27, 1942, when Swift resigned as an employe of the railroad, he earned in other employment the sum of $952.60 and that if he had occupied the claimed position during that period he would have received $1,159.22 in wages. In an unreported order, not appealed from, which is reproduced in Appendix G at page 81, the court, after finding that Swift was entitled to the position in question, held that there should be a set off against his wage loss of the amount earned by him in the service of other employers. In this respect, the court said in fixing the judgment at $206.62:

Affidavit of H. R. Stewart—Exhibit "B"

"Third, I find that the defendant (Railway Company) is entitled to an off-set as against the plaintiff's claim for loss of wages.

"The plaintiff concedes that such is the rule at common law and advances no persuasive reason why this rule should not prevail in this civil action.

"The statute (Railway Labor Act) does not provide a penalty in this regard and I think the plaintiff himself recognizes this common law rule as he asks in his complaint for an 'accounting' and not for a penalty."

(Page 5804)

The attention of the Board is also called to the section of the Exhibit beginning at page 23 which set forth the facts showing that the proposed rule is in accord with the rules and practices generally prevailing in other industries.

The Board will appreciate that my statement is but a summary of the material set forth in the Exhibit, and it is hoped that the entire exhibit will be examined by the Board.

As has been shown the proposed rule is fully in accord with the basic principles applied by the courts, is universally recognized as providing a sound measure of damages for the loss of employment, and will correct the anomalous results which have followed from interpretations of the intent of the "time lost" provisions of some of the present rules. The Board will, in my opinion, find that the proposal is in full accord with the rule recommended by the 1946 Emergency Board. The Board will not, I am sure, overlook the fact that it is an eminently fair rule to the employes.

Mr. MacGill: That completes Mr. Mackay's testimony.

(Page 5805)

The Chairman: Any questions from the Board?

Mr. Bushnell: No.

Mr. Wirtz: No.

Affidavit of H. R. Stewart—Exhibit "B"

The Chairman: Mr. O'Brien?

Mr. O'Brien: I have just one or two questions of Mr. Mackay on this. I suppose there is no rule that doesn't have an exception and we have one or two questions on this particular exhibit.

The Chairman: We don't hold you to exceptions.

Cross-examination

By Mr. O'Brien:

Q. Mr. Mackay, will you turn to page 14 of your printed exhibit? You draw some conclusions, one—

A. Will you excuse a minute until I find it so I can follow you?

Q. No. 1, there, "No board or tribunal has ever refused to permit the deduction of interim earnings because such board or tribunal was of the opinion that it was u ,just or unfair or otherwise wrong to permit such deductions." Now, you made a pretty careful study of these various decisions, Mr. Mackay, in your interest in this subject matter.

(Page 5806)

A. I have looked at a number of them, Mr. O'Brien. I have not examined them all.

Q. Did you examine this exhibit itself?

A. Yes, I read it—twice.

Q. I point out on page 9 of the exhibit, in a case involving the Louisville & Nashville Railway, that a man earned $9,000 elsewhere, while he would have earned $7,400 in the service of the Illinois Central.

A. That was an Illinois Central case.

Q. Yes, he had worked in the Louisville & Nashville in the interim.

A. I think he was at New Orleans and he got fired from the Illinois Central, and then he got a job on the Louisville & Nashville, and he earned about two thousand dollars more

there than he would have earned if he had remained on the Illinois Central.

Q. "Awards of this Division indicate that such credit has been given in some instances, in others not. Whether it should be given depends on the facts of the particular case. In this instance such credit is not justified."

Now, don't you think there he thought there was something unjust or unfair or unwise, or otherwise wrong, in permitting the deduction?

(Page 5807)

A. I don't know. Generally speaking, and I recall hearing Mr. Swacker say with respect to his decision during the 1946 hearing, that he did not find this payment because he thought it was just, but that he thought the particular rule required it.

I am not sure. I read so many of those things, Mr. O'Brien.

Q. I just wondered about it.

A. Whether this meant it should be paid under the rul or not, I don't draw the same conclusion from it that you do.

Q. Let's see if we can find out what he meant.

A. Sir?

Q. Let's see if we can find out what he meant.

A. All right.

Q. In his award—the Carrier people took issue with it—and back on pages 38, 39 and 40, it is discussed some more. The Referee wrote a sustaining opinion, after the Carriers dissented, and he said—this is at the bottom of page 39:

"It seemed to me at the time the opinion was written in this case that instances might arise where it would

(Page 5808)

be inequitable not to make a deduction, and I accordingly said that whether such deduction should be made 'depends

on the facts of the particular case.' The minority now complain that this leaves the whole matter in a state of doubt. If the minority is not satisfied to recognize the suggested latitude—that is, to make the deduction where it seems equitable to do so, it can be done under the particular rule involved, I see no alternative but to adhere to the principle enunciated in so many awards of this Division that no deduction will be allowed. I reiterate that so far as the facts of this case are involved there is no justification for such deduction."

He apparently thought there was a rather blatant violation of this man's rights by the particular carrier, and governed himself accordingly.

Now, has your study revealed any other theory such as the contract language itself, providing an alternative fixed payment theory in any of these awards?

Mr. MacGill: You mean liquidated damages?

Mr. O'Brien: I mean what the awards say. They call it an alternative of putting a man to work when he should have been working.

(Page 5809)

By Mr. O'Brien:

Q. Did your study reveal any of those awards?

A. I don't recall.

Mr. O'Brien: That is all.

The Chairman: All right, let us move along.

Mr. MacGill: All right, sir, that completes Mr. Mackay's testimony.

(Witness excused.)

* * * * * * *

AFFIDAVIT OF H. R. STEWART—EXHIBIT "F".

Award 16408
Docket 24239

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division
39 South La Salle Street, Chicago 3, Illinois
With Referee Carroll R. Daugherty

Parties To Dispute:

Brotherhood of Railroad Trainmen
Pennsylvania Railroad Company—East

STATEMENT OF CLAIM: "Request that all reference to dismissal of Brakeman E. F. Ricko as outlined in Notice December 26, 1946, account personal injury sustained by him at Scales, Altoona, Pa., November 17, 1946, be removed from his record, and that he be reinstated and compensated for all time lost in connection therewith."

FINDINGS: The First Division of the National Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

On November 17, 1946, Yard Brakeman E. F. Ricko, in alighting from standing freight car in Scales Yard, Altoona, suffered a fracture of his left ankle when he stepped on a lump of coal. Carrier obtained a statement about the accident from him on December 10, 1946; and on December 16, 1946 he was tried on a charge of having violated Safety Rule 1406. At the trial the statement of December 10 was incorporated by reference into the record; and no further evidence was introduced by carrier or Ricko. There were

no witnesses to the accident. On December 26, 1946, Ricko was notified of dismissal from service. By January 3, 1947, he had recovered sufficiently to be available for work and received from the medical examiner on that date a return-to-duty card. On April 5, 1947, the carrier's General Superintendent Newell offered to modify the dismissal to suspension. This offer was rejected. After appeal to a higher level of management, General Manager Nancarrow, on June 12, 1947, notified General Chairman Sites that Ricko would be restored to service with seniority unimpaired; his time out of service would be treated as a suspension; and his service record would be altered accordingly. Ricko returned to duty on June 19, 1947.

In the light of the foregoing, the claim in this case amounts to a request for the removal of the suspension discipline and for compensation for the time lost thereby, from January 3, 1947 through June 18, 1947.

In support of the claim, petitioner contends in substance that (1) Ricko was not given a fair trial, as required by Rule 6 of the parties' agreement; (2) his alleged offense was not proven by the available evidence; and (3) even if the offense had been proven, the discipline would have been, and was, excessive.

In respect to the alleged unfairness of the trial, the main contention is that the trial itself consisted of only four questions and answers, with no proper evidence adduced. We cannot agree with this position. We hold that Ricko's original statement was made part of the trial record, and that, since Ricko stated at the trial he had nothing further to add and there were no witnesses who could have been examined, the statement constituted an adequate record and basis for decision.

In respect to the other contentions of petitioners, we do not find Ricko's statement to have been a sufficient basis

for the decision of the carrier. Ricko does not appear to have violated Rule 1406. In his statement he was consistent and unshaken in saying that he held on to the car, as required by the rule, in alighting from the car. To us it appears that the accident occurred (that is, his foot did not get firmly placed) in large part because of his failure to perceive the lump of coal on which his foot stepped. But the rule on which the carrier based its decision did not mention the necessity for careful observation of the ground on which an employe steps in getting off standing equipment. In our opinion the carrier relied on the assumption that, because the accident occurred, this particular rule must of necessity have been violated. We cannot concur with this assumption. For this and the other reasons above stated, we hold that the carrier's decision lacked solid foundation. And we direct the carrier to clear Ricko's record of the alleged offense and subsequent disciplinary action.

The other main question before us is this: What compensation to Ricko will make him whole for the working time he lost while held out of service? In answering this question we reject, first, the contention that the period covered by such compensatory pay should run from January 3, 1947, to only April 5 or thereabout, when the carrier offered a leniency modification of previous discipline. Ricko was entirely within his rights in declining to accept such modification. We believe the period covered should be January 3, 1947, to June 18, 1947, inclusive.

Second, for the days he would have worked during this period, we rule that (1) Ricko shall receive his regular pay at pro rata rates; and (2) from the total amount he would have earned on such days at such rates shall be deducted the total amount of wage income, if any, earned by him in other employment, if any, during the above-mentioned

period—unless the practice of this carrier in applying Rule 7-A-1 (d) of the agreement is to the contrary.

Our reasons for ruling in favor of "deduction of outside earnings" may be briefly summarized as follows: When an employee is found by a tribunal such as ours to have been wrongfully discharged or otherwise disciplined so that lost time and earnings are involved, two things are involved—penalty on management and redress for the employe. Which of the two is given the greater emphasis determines in large part whether "outside earnings" are to be deducted. If penalizing management is considered the more important, it is probable that the tribunal will not allow such deduction. If the focus is on making the employe whole, the deduction will be permitted or ordered.

Among union-management agreements, some explicitly authorize such deductions and a few prohibit them; but most are silent on the question, being content either not to mention compensation for lost time or merely to state in general that such compensation shall be paid, but without defining explicitly what is meant by "compensation", "lost time", or "lost earnings". We are of the opinion that, where an agreement is not explicit and where there is no controlling practice to the contrary on a property, a general rule mentioning compensation for lost time or earnings shall be interpreted so as to permit or authorize deduction for earnings in outside employment. This is because we incline to the view, supported in import by law and by a number of awards of this Division, that the primary purpose of providing such compensation is to make the wronged employe whole. We think such an employe is made whole when he receives an amount of compensation from his primary employer plus wage income from one or more "outside" employers equal to the amount he would have earned if he had worked steadily with the primary employer in the absence of wrongful deprivation of such

work. To allow him more would make him more than whole; that is, he would be more than compensated for the time and the earnings he lost through the carrier's action.

We think, further, that although the emphasis here is on redress to the employe, the employer does not escape penalty. The employer suffers the penalty of having a managerial decision reversed or modified, and he usually also suffers the penalty of having to pay a certain amount of compensation to the wronged employe. In short, we are unable to agree with the contention that a ruling such as ours here relieves the employer of penalty and thereby makes him less careful to avoid future violations of similar nature.

It has been contended that, because the carriers sought from the railroad labor organizations a specific rule authorizing the deduction of outside earnings in such cases, the carriers have admitted that most present rules on the matter are to be interperted as not allowing or authorizing such deductions. We are not persuaded that this conclusion is necessarily valid. In our opinion the most that can be inferred from this move by the carriers is that most of the present rules are so general as to be susceptible of various and conflicting interpretations.

AWARD: Claim disposed of per Findings.

National Railroad Adjustment Board,
By Order of First Division,
Attest: (Signed) J. M. MacLeod,
Executive Secretary.

Dated at Chicago, Illinois, this 24th day of July, 1953.

AFFIDAVIT OF A. J. STIERSTAEDTER.

Affiant, A. J. Stierstaedter, states that he began railroad service on the Pennsylvania Railroad in March, 1913, and entered the service of the Louisville and Nashville Railroad on October 1, 1925, in the Transportation Department; that on January 1, 1926, he was transferred to the Office of the Assistant General Manager, which department functioned in the negotiation and administration of wage and labor agreements; that on May 16, 1928, with the establishment of the Office of Director of Personnel he continued to assume duties formerly performed in the Assistant General Manager's Office in various clerical positions; that on January 1, 1942, was promoted to Staff Assistant to the Director of Personnel, and on September 1, 1955, was appointed Assistant to the Director of Personnel.

Affiant states that while occupying the position of Staff Assistant it was his duty to assist the Director of Personnel and his Assistants in research of labor agreement matters, to investigate claims made and appealed under the operating crafts' agreements, and to assist staff officers of the Personnel Department in meetings and conferences.

Affiant further states that on July 16, 1947, he made the following conference memorandum and it is correct:

"Conference Memorandum:

In connection with Proposition of 45 Items submitted to L&N Railroad June 20, 1947, by Train and Engine Service Organizations;

Also Carriers' Proposed Rule Changes of 25 Items designated 'Attachment A' submitted to Train and Engine Service Employes, June 20, 1947.

Affidavit of A. J. Stierstaedter

Conference convened 10:00 A.M., July 14, 1947:

Present:

Carrier Representatives	Organization Representatives
W. S. Scholl, Asst. D. of P., L&N RR.	J. N. Hatcher, Genl. Chmn., B.L.E.
J. C. Grissom, Asst. to D.P., L&N RR.	C. S. Bryant, Acting Genl. Chmn., B.L.F.E.
A. J. Stierstaedter, Staff Assistant, L&N RR.	O. K. Pemberton, Genl. Chmn., O.R.C.
	C. J. McClain, Genl. Chmn., B.R.T.

Mr. Hatcher suggested that the Employees 'Proposition' be read first, Item by Item, each participant in the conference reading an item in turn; this procedure was followed, and after each reading a round-table discussion of the particular rule was had.

The first day's conference was concluded after reading and discussing Item 30.

Adjourned 12:00 Noon to be continued tomorrow.

Conference convened 10:00 A.M., July 15, 1947.

Present:

Carrier Representatives	Organization Representatives
J. C. Grissom, Asst. to D. of P.	J. N. Hatcher, B.L.E.
A. J. Stierstaedter, Staff Assistant.	C. S. Bryant, B.L.F.E.
	O. K. Pemberton, O.R.C.
	C. J. McClain, B.R.T.

The same procedure continued as on the day before, beginning with Item 31. At the conclusion of reading the 45 Items, Mr. Grissom declined the Employes Proposition.

At 10:35 A.M., the conference continued with the reading of the Carrier's Proposed 25 Rule Changes,

covered by 'Attachment A' by the participants, in rotation, at the conclusion of the reading of the 25 Items, the employe representatives each in turn stated they could not accept the Carrier's Proposals.

The employe representatives asked whether we were willing to join in national handling of the rules, and Mr. Grissom stated that we were not in position as yet to answer that question.

Mr. Grissom told the Committee of Employe Representatives that we would in a few days give them each a letter of reply to their 'Proposition.'

Likewise, the Employe Representatives stated they would write the Carrier in connection with our Proposal in 'Attachment A.'

Conference adjourned 11:40 A. M., July 15, 1947."

Affiant states that Item 18 of the Carrier's proposed rule changes of 25 items designated "Attachment A" reads as follows:

"18. PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS

— Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from amount due.

For the purpose of this rule self-employment shall not be considered as 'other employment.'

All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated.

Where no rule, regulation or interpretation as to the above proposal exists on this carrier, the fact that the subject matter is included in this uniform proposal is not to be construed as an admission to the contrary."

Affidavit of A. J. Stierstaedter

The above is a complete quotation and that contained on page 15 of Jake Paschall's Affidavit does not contain the last paragraph shown.

Affiant states that the proposition of 25 items of carrier's proposed rules were read in seriatim by the conferees present, and little or no discussion was had after such reading.

Affiant further declares that no admission was made by the carrier's representatives that the rules as then in effect did not permit deductions of outside earnings nor was any statement made that it had not been the practice to make such deductions under its rules in the past. In fact, no discussion was had between the parties with respect to Item 18 of the carrier's proposal, except the reading thereof, nor was there any discussion concerning Article 31 of the existing agreements.

(s) A. J. Stierstaedter.

Commonwealth of Kentucky)
County of Jefferson) ss

Subscribed and sworn to before me by A J. Stierstaedter, this 25th day of August, 1960.

My Commission expires Feb. 19, 1963.

(s) A. M. Bradford.
Notary Public.

(Seal)

AFFIDAVIT OF G. C. HOWARD.

Affiant, G. C. Howard, states that he is a resident of Louisville, Jefferson County, Kentucky; that he was employed by the Louisville and Nashville Railroad Company in various capacities from April 1, 1907 until the time of his retirement on August 31, 1956; that from May 1939 to November 1946 he was employed in the capacity of Assistant Director of Personnel, and from November 1946 to August 1955 he was employed in the capacity of Director of Personnel; that during the 16 years that he was a member of the staff of the Personnel Department, he was engaged in the administration of the agreements between the Louisville and Nashville Railroad Company and the several crafts or classes of employees, including the agreement with the Brotherhood of Locomotive Firemen and Enginemen; that he engaged in the handling of claims and grievances arising under the said agreements with the firemen, engineers, conductors and trainmen, and in the negotiations of revisions of such agreements on a property level and on a National basis.

Affiant states that he is familiar with Rule 31(f) of the agreement between the Louisville and Nashville Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen; that prior to June 20, 1947 and subsequent to that date, Rule 31(f), in pertinent part, was as follows:

> "(f) If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken."

Affiant states that at all times that he was in the Personnel Department of the Louisville and Nashville Railroad Company, both prior to June 20, 1947 and subsequent

to that date, Rule 31(f) was interpreted by those representing the carrier as authorizing the carrier to take into consideration the deduction of outside earnings, or other earnings, in computing the proper amount due an employee for time lost from the carrier's service where the carrier's discharge of the employee was not sustained.

Affiant states that he is familiar with the notice served on June 20, 1947 by the Louisville and Nashville Railroad Company upon the several General Chairmen of the train and engine service organizations on the L&N, that is, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen. He states that the carrier submitted proposed rule changes of 25 items and that the General Chairmen of the aforesaid train and engine service organizations served notice on June 20, 1947 of proposed rule changes of 45 items. The notices were served by the carrier and the aforesaid labor unions pursuant to Section 6 of the Railway Labor Act and are commonly referred to in the railroad industry as Section 6 notices.

Affiant states that the proposed rule changes included in the aforesaid Section 6 notice served by the Louisville and Nashville Railroad Company on June 20, 1947, were prepared or formulated on what is known in the railroad industry as a National basis. He states that he believes that the proposed rule changes sought by the labor unions in their Section 6 notice served upon the Louisville and Nashville Railroad Company on June 20, 1947 were prepared or formulated on a National basis also, the notice from the General Chairmen of the aforesaid labor unions having contained the following request:

"In event settlement is not reached in conference, it is requested that this Company join with other companies in authorizing a National conference committee to represent them in dealing with the subject."

Affiant states that he is familiar with Item 18 of the proposed rule changes sought by the railroads and which was included in the aforesaid notice served by the Louisville and Nashville Railroad Company on June 20, 1947. Item 18 was as follows:

"18. PAY FOR TIME LOST TO BE REDUCED BY OTHER EARNINGS

"Where payments are made for 'time lost' for any reason, any earnings made in other employment during time out of service shall be deducted from the amount due.

"For the purpose of this rule self-employment shall not be considered as 'other employment'.

"All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated.

"Where no rule, regulation or interpretation as to the above proposal exists on this carrier, the fact that the subject matter is included in this uniform proposal is not to be construed as an admission to the contrary."

Affiant states that the carriers' request as set forth in Item 18 of their proposals of June 20, 1947, was not an admission that the carriers could not properly deduct earnings in other employment in computing pay for time lost under existing agreements with the aforesaid labor unions and the proposal expressly so provided. He states that prior to June 20, 1947, a few Referees of the National

Railroad Adjustment Board had construed some existing agreements of other railroads on the subject as not authorizing such consideration and deduction of outside earnings, and some Referees of the aforesaid Board had construed some existing agreements of other railroads as properly authorizing such deductions. He states that the Louisville and Nashville Railroad Company and the many other railroads that were parties to this National rules case were simply seeking to obtain a rule that could not possibly be subject to any misinterpretation on the subject of outside earnings. He further states that the proposal in Item 18, if it had been enacted, would not have changed the intent of Rule 31(f) as it had been interpreted and construed, but would simply have affirmed it.

Affiant states that National negotiation and mediation involving the proposal for rule changes resulted in no change of Article 31 of the agreements between the Louisville and Nashville Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen. He states that Article 31 in each of the agreements between the Louisville and Nashville Railroad Company and its employees represented by the four aforesaid labor organizations remained with the same wording and exactly the same interpretation as each of the existing rules had prior to the service of the Section 6 notice on June 20, 1947, that is, that the carrier was authorized to consider deductions of outside earnings in computing payments for time lost.

Affiant states that, without attempting any exhaustive references, there are two cases handled during his employment in the Personnel Department and concerning which he has knowledge involving the carrier's position with respect to deduction of outside earnings prior to June 20, 1947 and which show that the carrier interpreted such rules

as authorizing deduction for outside earnings even before the service of its Section 6 notice of June 20, 1947.

The first of these cases involved Train Baggageman J. B. Cooper. The National Railroad Adjustment Board, in Award No. 5248 decided November 28, 1940, ordered that "The claimant is entitled to be restored to duty with full rights and paid full wages for time lost." In interpreting this Award and Article 31 of the agreement with the Brotherhood of Railroad Trainmen and in ascertaining the amount that would actually be due the claimant, Mr. W. B. Porter, then Assistant Director of Personnel of the carrier, prepared a memorandum dated March 24, 1941, on this subject, and concerning which this affiant has personal knowledge by assisting in the handling of the Cooper case. This memorandum, in part, stated:

> "There is nothing in the papers to show what money Mr. Cooper earned while he was off, which earnings should be credited to the amount paid him."

A true and correct copy of the above memorandum prepared from the microfilm records of the Personnel Department is attached hereto and marked Exhibit "A".[1]

The second case involved a Petition with the cause of action based upon Article 31 of the agreement with the Order of Railway Conductors filed by George M. Wells against the Louisville and Nashville Railroad Company in the Whitley Circuit Court. From an adverse judgment in the Circuit Court, the carrier appealed. While the carrier attacked the judgment on several grounds, it nevertheless asserted in its brief before the Court of Appeals the following argument:

> "By instruction No. 3 the jury was authorized to award appellee the sum of $250.00 per month, his aver-

[1]Exhibit "A" is printed in this Appendix on pp. 267b-270b, *infra*.

age earnings as a conductor, from July 1, 1933, the date when he reported back for duty, until November 21, 1939, the date suit was filed. This instruction did not impose upon appellee any duty to seek other employment while out of appellant's service, but on the contrary authorized the full amount he could have earned had he been working as a conductor. It is a familiar principle of law that a plaintiff seeking damages for breach of contract must both plead and prove reasonable diligence to minimize his loss. The rule is thus stated in John C. Lewis Co. v. Scott, 95 Ky. 484, 26 S. W. 192, supra:

> 'Thus the measure of damages is the same everywhere, it is the contract price less what the discharged employee has earned or might by reasonable diligence have earned * * *. The law does not imply loss of time and employment by reason of the discharge * * *. It does not follow necessarily that because the servant is thrown out of employment by his wrongful discharge he will remain idle for the term he had intended to work.'

"*it will thus be seen that even if appellee had sued upon a contract to which he was a party which provided for his employment for a definite and fixed period of time, and had shown a wrongful discharge before the expiration of such period, he could recover only the amount he would have been paid under the contract, less what he could have earned in other employment, if such other employment could have been found by the exercise of reasonable diligence.* If such is true where there is an enforceable contract, and where there has been a wrongful discharge, then, a fortiori, it is true where neither of these things exist, as in the instant

case. It would be difficult to conceive of a more prejudicial and erroneous instruction than No. 3." (Emphasis added.)

The opinion of the Court of Appeals rendered March 3, 1942, reversing the judgment of the Circuit Court and sustaining the contentions of the carrier is reported in *Louisville & N. R. R. Co.* v. *Wells*, 289 Ky. 700, 160 S. W. 2d 16.

(s) G. C. Howard.

Commonwealth of Kentucky
County of Jefferson } ss.

Subscribed and sworn to before me by G. C. Howard, this 23rd day of August, 1960.

My Commission expires December 5, 1961.

(s) F. R. Wilton,
(Seal) Notary Public.

AFFIDAVIT OF G. C. HOWARD—EXHIBIT "A".

Memorandum concerning J. B. Cooper.

Train baggageman Cooper reported for duty on train No. 3, March 20, 22 and 24, 1936, under the influence of intoxicants and was discharged April 26, 1936. On November 26, 1936, General Chairman McClain and some members of the B. of R. T. Committee, together with Cooper, made an earnest appeal for reinstatement on leniency grounds. Cooper made the promise that if given another chance he would conduct himself properly in the future, and Mr. Parsons reluctantly agreed with General Chairman McClain to put him back to work, but in a sense, on parole, as it was agreed that if he gave any further trouble account

of drinking the matter would not be handled by the Organization.

He was again charged with violation of Rule "G" when called as a conductor out of Corbin for 12:30 A.M., January 16, 1937. He was discharged March 19, 1937.

On July 9, 1937, General Chairman McClain made request for Cooper's reinstatement by letter and asked for conference on the subject. His letter was replied to under date of July 22, 1937, and reinstatement was denied. On October 15, 1937, this conference was held with General Chairman McClain and his Committee and Mr. McClain advised when his attention was called to the promises made by him and Mr. Cooper on November 26, 1936, that he would not handle the case further, he having made this statement to both the Director of Personnel and Assistant Director of Personnel Porter several times between the date of his letter, July 9, 1937, and date of conference, October 15, 1937.

Nothing more was heard from General Chairman McClain until conference on March 24, 1939, a period of 1 year, 5 months and 9 days.

During this period Mr. Cooper appealed his case to the B.R.T. General Committee of the L&N Railroad and they sustained General Chairman McClain. Cooper then appealed his case to the Appeals Board or some other tribunal of the National B. of R. T. Organization at Cleveland, and the General Chairman and General Commitee were reversed and it was then in conference on March 24, 1939, that this information was given by Mr. McClain and he advised that the case would have to be submitted to the National Railroad Adjustment Board, and a joint submission was made by General Chairman McClain and this office on November 6, 1939, but hearing was not held on the case until August 6, 1940, and Award was rendered by the

Affidavit of G. C. Howard—Exhibit "A"

First Division, National Railroad Adjustment Board, with Referee Mr. Robert G. Simmons, under date of November 28, 1940. This Award, No. 5248, directed that:

> "the claimant is entitled to be restored to duty with fully rights and paid full wages for time lost."

Check as claimed by Mr. McClain from March 20, 1937 to January 3, 1941 (a period of 45 months and 13 days) shows a total amount of $11,062.27, or earnings of approximately $243.13 per month. Checking back for a like period, or from December, 1932 to March, 1937 (eliminating May, June, July, August, September, October and November, 1936, period Mr. Cooper was out of the service), he would have earned as train baggagemaster without counting any time whatever as a conductor had he worked every day as train baggageman, the sum of $9,052.81, an average of $199.25 per month. However, due to his irregularity in working, he earned only $6,816.35 or an average of $150.03 per month.

Mr. Cooper was stricken with pneumonia October 27, 1939, and operation was performed on his chest in order to drain his lungs in the City Hospital at Louisville on November 19, 1939. He was discharged from the hospital in April, 1940, and X-ray done in July, 1940, when his chest was pronounced all right. There was, of course, an onslaught of the disease so he could not have worked from October 20, 1939 to sometime in July, 1940, a lapsed time of 8½ months, putting the date of discharge by the doctors as of July 5, 1940.

There was a delay of 17 months by the B. of R. T. Organization. The Board delayed the case from November 6, 1939 to August 6, 1940, 9 months, before being heard.

After the hearing decision was not rendered for 3 months and 24 days.

Affidavit of G. C. Howard—Exhibit "A"

There is nothing in the papers to show what money Mr. Cooper earned while he was off, which earnings should be credited to the amount paid him.

W. B. Porter.

WBP—C
Louisville, Ky.
March 24, 1941

This is a true and correct copy of the above memorandum found in microfilm record, box 10, of the Personnel Department, Louisville and Nashville Railroad Company.

(s) Miss Ruth B. Myers.

Subscribed and sworn to before me by Miss Ruth B. Myers this 23rd day of August, 1960.

My commission expires February 19, 1963.

(s) A. M. Bradford,
Notary Public,
(Seal) Jefferson County, Kentucky.

AFFIDAVIT OF A. M. BRADFORD.

Affiant, A. M. Bradford, states that he is now and has been an employee of the Louisville and Nashville Railroad Company since June 24, 1946, and that he is now and has been the Chief Clerk of the Law Department of this Company since June 1, 1952.

Affiant states that as a part of his duties as Chief Clerk of the Law Department he is responsible for maintaining a docket of cases pending in the various courts involving the Louisville and Nashville Railroad Company, and that such a list or docket of pending cases is kept and main-

tained under his direct supervision. He states that in the usual and ordinary course of handling the legal affairs of the Louisville and Nashville Railroad Company, this docket of cases would reflect whether or not any complaint had been filed against the railroad by B. G. Humphries in any United States District Court.

Affiant states that he has examined this docket of cases for the period from May 1, 1958 to the date of this affidavit, and states that he has made a search of other files and records of the Law Department of the Company to ascertain if there is any record of any suit having been filed during said period against the Louisville and Nashville Railroad Company by B. G. Humphries, and, specifically, for the purpose of ascertaining if there is any record of B. G. Humphries having filed any complaint against the Louisville and Nashville Railroad Company in any United States District Court for the purpose of enforcing any award of the National Railroad Adjustment Board.

Affiant states that there is no record in the Law Department of the Louisville and Nashville Railroad Company of B. G. Humphries having filed any complaint in any United States District Court for the purpose of enforcing any award of the National Railroad Adjustment Board.

(s) A. M. Bradford.

Commonwealth of Kentucky)
County of Jefferson) ss

Subscribed and sworn to before me by A. M. Bradford, this 23rd day of August, 1960.

My Commission expires December 5, 1961.

(s) F. R. Wilton,
Notary Public.

(Seal)

SUPPLEMENTAL AFFIDAVIT OF H. R. STEWART.

Affiant, H. R. Stewart, Assistant Director of Personnel of the Louisville and Nashville Railroad Company, states that he has read the supplemental affidavit of Jake Paschall, and he makes this supplemental affidavit for the purpose of replying to certain new matters introduced by Mr. Paschall and pointing out certain inaccurate and misleading statements in his affidavit.

Commencing at page 9 of his supplemental affidavit, Mr. Paschall referred, for the first time, to carrier's Section 6 notice of July 27, 1945, specifically to Item 20, which he stated "was in exactly the same language as Item 18 of 'Attachment A' attached to the Section 6 notice of June 20, 1947".

Affiant states that the notice of July 27, 1945, was served on the General Chairmen of the Order of Railway Conductors and the Brotherhood of Locomotive Firemen and Enginemen and a similar notice had been served on the General Chairmen of the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen on July 24, 1945. The notices, prepared and formulated on what is known in the industry as a "national basis", were served after receipt of Section 6 notices from the General Chairmen of these four unions involving rules proposals and demands for increased rates of pay.

Affiant states that, as in the 1947 National Rules case referred to in his original affidavit (p. 2), these 1945 notices of the carrier and the brotherhoods were formulated on a national basis, and, after holding the required conferences on the property, the numerous proposals were referred to conference committees representing the unions and the many carriers which had received and served such notices, for negotiation on a national basis. These national negotiations and a nationwide strike by the engineers and train-

men in May, 1946, resulted in the granting of wage increases and also in a rules moratorium of one year.

Affiant states that, following the expiration of the one year moratorium on rules proposals, both the unions and the carriers served new notices in June, 1947, and Item 18 of carriers' proposals of 1947 was explained by affiant's original affidavit herein.

Affiant further states that the carriers included Item 20 in their notices of July, 1945, for exactly the same reason that Item 18 was incorporated in their notices of June 20, 1947. The inclusion of Item 20 in carrier's notices of July, 1945, was not an admission that it could not properly deduct earnings in other employment in computing pay for time lost under Article 31 of its agreements with the unions; that this carrier and the many other parties to the 1945 National Rules case, as in 1947, were simply trying to stop a tendency on the part of a few referees that had sat with the National Railroad Adjustment Board, First Division, to misinterpret their existing rules; that the carriers were seeking a clarification of such rules so as to avoid any possibility of misinterpretation of such rules on the subject of outside earnings.

Affiant further states that failure to obtain the clarification sought in 1945, as in 1947, did not change Article 31(f) of the agreement between the Louisville and Nashville Railroad and its employees represented by the Brotherhood of Locomotive Firemen and Enginemen. It left Article 31(f) with exactly the same meaning it had prior to July, 1945, that is, earnings in other employment during the time out of service could be deducted in computing payments for time lost.

At page 11 of his supplemental affidavit, Mr. Paschall referred to decisions 126, 1239, 1433, 1694 and 2271 of the "Railroad Adjustment Board No. 1" which were mentioned

in the testimony of carriers' witness, C. D. Mackay, before the Presidential Emergency Board on March 4, 1948.

Affiant states that, as shown by his original affidavit (p. 4) and Exhibit "B" thereto, the above decisions were decisions of Railway Board of Adjustment No. 1. It is true that this Railway Board of Adjustment No. 1 existed before the passage of the Railway Labor Act. It was established by the United States Railroad Administration on March 22, 1918, to decide, among other things, disputes involving existing agreements between carriers and engine and train service brotherhoods.

Mr. Paschall then stated, at page 11 of his supplemental affidavit ". . . ; nor did Mr. Stewart point out that those decisions were made before the Railroad Company had its first contract with Affiant's Brotherhood". The significance of Mr. Paschall's comment is not plain to this affiant. If this affiant had made such a statement it would not have been true. Affiant states that records of decisions of Railway Board of Adjustment No. 1 available to him reveal that hearings on Case No. 126 were held on August 7, 1918, hearings on Case No. 1239 were held on October 13, 1919, hearings on Case No. 1433 were held on February 4, 1920, hearings on Case No. 1694 were held on February 6, 1920, and Case No. 2271 was decided on September 18, 1920. The decision in each of these cases undoubtedly was rendered after the hearings. Thus, it is clear that at least decisions 1239, 1433, 1694 and 2271 were made after August 1, 1919, the date which Mr. Paschall stated was the date of this Company's first contract with the Brotherhood of Locomotive Firemen and Enginemen (See supplemental affidavit of Mr. Paschall, page 2). As an illustration, a copy of the earliest of these four decisions, No. 1329, is attached hereto as Exhibit "A".[1]

[1]This Exhibit is printed in this Appendix on pp. 276b-277b, *infra*.

Supplemental Affidavit of H. R. Stewart

Affiant further states he did not represent, nor was it represented in Mr. Mackay's testimony before the Presidential Emergency Board, that the above decisions of the Railway Board of Adjustment No. 1 and Awards Nos. 404, 428, 465 and 1055 of the First Division, National Railroad Adjustment Board involved any agreement with the Louisville and Nashville Railroad Company. Mr. Mackay's entire testimony before the Presidential Emergency Board on Item 18 of carriers' proposal, including his cross-examination by counsel for the labor unions, was attached as Exhibit "B" to affiant's original affidavit filed herein. Affiant believes that a reading of this official transcript, particularly pages 5785-5786, will make it evident that when Mr. Mackay referred to the above decisions and awards, he was referring to cases involving rules that were silent on the subject of deduction of outside earnings, that is, rules that provide merely that employees will be "paid for time lost," "paid full wages for time lost if any," "paid for time lost at his regular rate for each calendar day," "paid the amount he would have earned" and similar provisions.

Affiant states that Mr. Mackay's testimony on Item 18 of carriers' proposal given before the Presidential Emergency Board during the handling of it and other proposals pursuant to the Railway Labor Act was introduced for the purpose of showing the reason the carriers on a national basis included such a proposal, that is, the carriers were seeking clarification of many rules on the subject of outside earnings in order to avoid any possibility of misinterpretation of existing rules concerning deduction of outside earnings. It was introduced for the purpose of rebutting the speculative statements of the General Chairmen in this proceeding, including Mr. Paschall, concerning the reason why the carriers on a national basis included Item 18 in their proposals of June 20, 1947.

(s) H. R. Stewart.

Supplemental Affidavit of H. R. Stewart

Commonwealth of Kentucky)
County of Jefferson) ss

Subscribed and sworn to before me by H. R. Stewart, this 15th day of September, 1960.

My Commission expires February 19, 1963.

(s) A. M. Bradford,
Notary Public,
(Seal) Jefferson County, Kentucky.

SUPPLEMENTAL AFFIDAVIT OF H. R. STEWART—EXHIBIT "A".

Case No. 1239.

UNITED STATES RAILROAD ADMINISTRATION.
Director General of Railroads.

RAILWAY BOARD OF ADJUSTMENT No. 1,
Southern Railroad Building, 1300 Pennsylvania Avenue.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD
AND
ENGINEERS AND FIREMEN.
REQUEST FOR REINSTATEMENT OF FIREMAN WITH PAY FOR ALL TIME LOST; DISMISSED, IT BEING ALLEGED, WITHOUT ADVICE AS TO CHARGES PREFERRED OR WITHOUT INVESTIGATION.

(Hearings were held on this case October 13, 1919.)

DECISION.

The evidence submitted to the Board in this case is not sufficiently conclusive to justify the action of the company

in this dismissal, and it is the decision of the Board that Fireman Stenick be reinstated without impairment of his seniority and be paid a minimum day for each calendar working day since the date of his dismissal, less what he has actually earned since that time; the period that he was in military service not to be taken into account either in figuring his minimum days or in computing his actual earnings. Mr. Stenick shall have 30 days after being notified of this decision to elect whether he desires to reenter the service of the company, and the period for which he is to be paid minimum days shall cease on the day he is so notified. He is to be paid any amount due him under the decision, however, regardless of whether or not he elects to return to the service of the company.

F. A. Burgess,

Chairman Railway Board of Adjustment No. 1.

Washington, D. C.

143974—19

SUPPLEMENTAL AFFIDAVIT OF W. T. WALLACE.

Affiant, W. T. Wallace, Assistant to the Director of Personnel, Louisville and Nashville Railroad Company, states that he has read the supplemental affidavit of Jake Paschall, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, filed herein by the defendant Labor Unions, and because of the untrue statement that inaccuracies and misleading statements are contained in this affiant's affidavit filed August 25, 1960, he files this supplemental affidavit in rebuttal to the Paschall supplemental affidavit.

At page 1 of his supplemental affidavit, Mr. Paschall quoted this affiant as follows:

"carrier has always understood and interpreted Article 31 of the firemen's agreement to permit deduction of outside earnings, if any, from the amount the fireman would have earned had he remained in railroad service."

Then, at page 2, Mr. Paschall stated:

"If, by the above quoted statement, the Affiant, Wallace, meant to convey the idea that there was any agreement between the Railroad Company and this Affiant's Brotherhood that Article 31(f) of the Firemen's contract permitted the deduction of outside earnings, such insinuation or intimation is absolutely without foundation. If, by the quoted language, the Affiant, Wallace, intended to convey the impression that in settling awards such as the Humphries award the Railroad Company, in accordance with its alleged interpretation of Article 31(f), deducted outside earnings, such intimation or claim is absolutely without foundation. . . ."

Affiant states there is nothing inaccurate or misleading in his statement that "Carrier has always understood and interpreted Article 31 of the firemen's agreement to permit deduction of outside earnings, if any, from the amount the fireman would have earned had he remained in railroad service." That statement is clear and unambiguous and means exactly what it says.

This affiant has not contended that the Railroad Company and the Brotherhood are in accord that Article 31(f) of the firemen's contract permits the deduction of outside earnings. Neither has this affiant ever contended that the railroad has actually had occasion to deduct outside earnings in the settlement of any of the few prior cases under

this rule. He has stated that the carrier has always understood and interpreted Article 31(f) to permit deduction of outside earnings, if any, and that the carrier has never paid gross earnings in a case where it had knowledge that the employee being restored to service with pay for time lost had outside employment.

At pages 2 and 3 of Mr. Paschall's supplemental affidavit, the statement is made that this affiant, W. T. Wallace, and others making affidavits filed by the Railroad Company, must know that the Railroad Company has never had the right to make a unilateral interpretation of Article 31(f), and each knows that Article 32(c) provides that general rulings or interpretations as to the proper construction of the firemen's agreement will not be made except in conference between the General Officials of the Railroad and the General Committee or General Chairman.

This affiant is thoroughly familiar with Article 32(c) of the firemen's agreement and states that it is incorrectly quoted in the Paschall supplemental affidavit, page 3. The second paragraph of that quote is not contained in the rule. Apparently this is an error in typing whereby the last sentence of the rule was inadvertently repeated.

Affiant states it is not unusual for the Railroad Company and the Brotherhood to place divergent interpretations on the proper meaning and application of the various rules of the agreement between them. This is the reason for the grievance procedure set up by the Railway Labor Act for the settlement of such disputes. It is true that under rule 32(c) general rulings or interpretations as to the proper construction of the agreement are not made except in conference between the General Officials of the Railroad and the Union. But the parties are not always able in conference to reconcile their separate understanding and interpretation of specific rules, as now is the case with

respect to Article 31(f) of the firemen's agreement. And certainly there is nothing in rule 32(c) which denies the carrier the right to insist on what it considers, and has always considered, to be the proper interpretation and application of Article 31(f).

Affiant states further that his testimony during cross-examination at the hearing before the Court on May 18, 1959, should have dispelled any doubts about the proper meaning of his statements. The affiant, at pages 142-143 of that transcript, stated:

"Q. Now I want you to tell the Court in all of your experience as an employee connected with the personnel problems of the railroad do you know of a single case where the union ever agreed in the settlement of back pay awards in a situation such as the Humphries case? I say, do you know of any case where the union ever knew—

"A. (Interrupting) I don't know of any—

"Q. (Continuing)—that you might make any such deduction?

"A. I don't know of any case where that question ever came up to the issue till this case.

"Q. Well, how could you say that the rule as construed on the property was permitting you to deduct it?

"A. Judge Dawson, we had construed that rule from the management standpoint over and over again. We had so construed it in the Alston case. We so advised the organization we so construed it in the case of Yardmar Neal.

"Now it's true we did not have an interpretation that was agreed to by both—

"Q. (Interrupting) Do you know—

"Mr. Sandidge (Interrupting): Just a minute. Let him answer.

Supplemental Affidavit of W. T. Wallace

"A. We had interpreted that rule through the years that where a man had outside earnings we were privileged to deduct it.

"Now, very apparently, the organization had construed otherwise, and when we come up to a case where we've got this question now we have—were unable to get an agreed to interpretation, and there was one way to get it, and that was to go to the Adjustment Board, and that was according to the procedure set up under the Railway Labor Act."

Beginning at the bottom of page 3 of his supplemental affidavit, Mr. Paschall stated:

"The Wallace Affidavit undertakes to support its claim of right to deduct outside earnings by statements to the effect that before settling awards made to its employees, it had demanded of such employees a statement of outside earnings. If any such demand was ever made in reference to an award in a discipline case, it was made without the knowledge of this Affiant as General Chairman (L&N System) of his Brotherhood; but in respect of such demand claimed by Wallace to have been made in the Alston case, this Affiant learned of same—not from the Railroad Company, but from a copy of Alston's letter to the Railroad Company in which he stated that he had no outside earnings."

The Director of Personnel wrote General Chairman Paschall concerning the Alston case on August 26, 1955, copy of the letter attached hereto as Exhibit "A",[1] wherein he advised Mr. Paschall, in part, as follows:

[1]This Exhibit is the same as Plaintiff's Exhibit No. 13 at the Oral Hearing and is printed in this Appendix on pp. 71b-73b, *supra*.

Supplemental Affidavit of W. T. Wallace

"Please recall our conversation yesterday concerning money payment due Fireman T. Y. Alston, Nashville Terminals, under First Division Award No. 17030.

"Fireman Alston was dismissed from the service effective February 14, 1953, and was restored June 28, 1955. He has *advised that during this period he had no income whatever aside from benefits paid him by the Railroad Retirement Board*, which, of course, have to be deducted from the amount due him." (Emphasis added.)

Affiant states that this was notice from the Railroad to Mr. Paschall that it had called on Fireman Alston for a statement of his earnings in other employment while out of railroad service. Obviously, there would have been no reason for the Railroad to do so if it had not considered deduction of outside earnings, if any, to be proper under Article 31(f) in determining amount of money due Fireman Alston under the Board Award. General Chairman Paschall acknowledged receipt of the Director of Personnel's letter of August 26, 1955, in his reply of August 29, 1955, a copy of which is attached hereto as Exhibit "B".[2]

In the first full paragraph on page 4 of Mr. Paschall's supplemental affidavit, exception is taken to the five cases cited at page 12 of this affiant's affidavit as evidence of the different ways in which the First Division of the National Railroad Adjustment Board has dealt with the deduction of outside earnings, and the statement is made that none of those cases throw any light on the proper construction of Article 31(f) of the firemen's agreement. In the first place, the paragraph referring to these awards should be read in context with the paragraph immediately preceding it. It then becomes evident that these awards were cited

[2]Exhibit "B" is printed in this Appendix, p. 287b, *infra*.

by this Affiant simply to show the various Awards of the Board in ordering employees restored to the service when claim for time lost was involved, and no contention was made by this Affiant that those awards were controlling in a proper interpretation of Article 31(f) of the firemen's agreement. Secondly, Mr. Paschall there stated that Awards 15,655 and 12,629 covered disability cases—not discipline cases—and, therefore, throw no light on the proper construction of Article 31(f) which deals exclusively with awards in discipline cases. Yet the organizations herein first filed supplemental affidavit of L. G. Mulinix wherein he cited and filed herein Award 15,655 (involving the disability of Conductor T. C. Smith) and stated this Award had interpreted the Conductors' agreement with respect to wrongful discharge to prohibit deduction of outside earnings.

At the bottom of page 4 of the supplemental affidavit, Mr. Paschall stated:

> "The Humphries case is the first case in which this Affiant was informed by the Railroad Company of its contention of its right to deduct outside earnings in settling discipline awards under Article 31(f); . . ."

This Affiant states that General Chairman Paschall was informed by the Railroad prior to the Humphries case that it considered deduction of outside earnings to be proper in settling discipline awards under Article 31(f). This was the only purpose in the Railroad obtaining a statement of outside earnings as was done in the Fireman Alston case in 1955 which was prior to the dismissal of Fireman Humphries in 1956 (see page 4 hereof and Exhibit "A" and "B" attached hereto).

At page 5 of Mr. Paschall's supplemental affidavit, the following statement is made:

Supplemental Affidavit of W. T. Wallace

"Wallace filed with his Affidavit a copy of his letter to this Affiant dated June 26, 1958, in which he refers to an award made to a shop laborer in Nashville, Tennessee, which was settled by deducting from the amount due for time lost outside earnings of the shop laborer. Reference to the settlement of that case was for the purpose of trying to sustain the Railroad Company's claim that Article 31(f) of the contract had been interpreted as permitting the deduction of outside earnings. This statement in the letter of June 26, 1958, filed by Wallace and his attempt to make it a basis for the contention that Article 31(f) had been interpreted as claimed by the Railroad Company is, to say the least, a palpable attempt to mislead the Court. Nowhere has the Railroad Company or its affiants advised this Court that the shop laborer referred to in the affidavit was a member of the Firemen and Oilers' Union, and at the time of the settlement referred to that organization had a contract with the Louisville & Nashville Railroad Company which expressly provided for the deduction of outside earnings in the settlement of awards rendered in discipline cases. . . ."

Mr. Paschall's charge that affiant's inclusion in his affidavit of the letter of June 26, 1958 to Mr. Paschall "is a palpable attempt to mislead the Court" is a frivolous accusation and it is emphatically denied. The paragraph of that letter containing reference to the award involving a shop laborer reads:

"Never has a discipline rule under any agreement this Carrier has with its various classes of employes, including Article 31 of the Firemen's Agreement, been construed on the property as prohibiting deduction of outside earnings. Neither do we have record of ever

having done more than make any employe whole when he had other employment while out of L. & N. service in compliance with a Board Award or otherwise. On the other hand, Awards of other divisions of the National Railroad Adjustment Board have consistently recognized the principle that deduction of outside earnings is proper. For instance, we recently reinstated a shop laborer at Nashville in compliance with an award of the Second Division and deduction of outside earnings was made in line with the discipline rule of the F. & O. Agreement."

This was a letter written to Mr. Paschall and was written before this litigation was ever commenced. The letter specifically shows that the award was under the F. & O. (Fireman and Oilers') Agreement, and that the deduction of outside earnings was made in line with that agreement. Mr. Paschall was aware that the carrier was not asserting that the award involved a member of the class or craft of employees represented by his brotherhood or that it involved their agreement. It was cited as an example to remind Mr. Paschall that under other agreements, here specifically the F. & O. Agreement, the carrier had actually made deduction of outside earnings. The June 26, 1958 letter was quoted by this affiant in its entirety, rather than mere excerpts therefrom, in order to give the Court as complete and accurate a record as possible as to what actually transpired on the property between Mr. Paschall and the carrier's representatives in the handling of the dispute involving the Humphries Award.

Beginning at page 6 of his supplemental affidavit, Mr. Paschall devotes almost two pages of argument that the Wells case did not involve Article 31(f) of the carrier's agreement with Wells' brotherhood. The case, *Louisville & Nashville Railroad Company* v. *Wells*, is reported in 160

S. W. 2d 16. The Court's opinion above makes it clear that Wells actually based his suit upon Article 31 of the agreement and the Court quoted that Article in its opinion, including the last part thereof as follows:

> ". . . In the event the charge or charges are not proven, the accused will be promptly restored to the service with full rights and paid full wages for any time he may have lost as a result of the charge or investigation."

The Court's Opinion states several reasons why Wells could not recover, one of which is quoted below in pertinent part:

> "The plaintiff did not plead or prove that he had been unable to procure any employment during the six years and more since his alleged recovery or that he had not earned any money at all. When a contract for personal services has been wrongfully terminated by an employer, it is the duty of the employee to minimize his damages by diligently seeking to find similar employment in the locality. He cannot sit by idly. He cannot recover more than the difference between the contract wages or salary and the amount he earned or could have earned with reasonable diligence. And on this element of a right of action for damages for breach of contract of employment, the burden is on the plaintiff to allege and prove that he exercised reasonable diligence in the respect stated and his inability to earn anything, if such was the case, or what he earned during the period. . . . There was neither pleading nor proof of his fact. so even had the other fatal defects not existed, he would have been entitled to recover only nominal damages."

(s) W. T. Wallace.

Supplemental Affidavit of W. T. Wallace

Commonwealth of Kentucky)
County of Jefferson) ss.

Subscribed and sworn to before me by W. T. Wallace this 15th day of September, 1960.

My commission expires February 19, 1963.

(s) A. M. Bradford,
Notary Public, Jefferson County,
(Seal) Kentucky.

SUPPLEMENTAL AFFIDAVIT OF W. T. WALLACE—EXHIBIT "B".

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN
Louisville 2, Kentucky

August 29, 1955

Please refer to
File C-955-12(b)

Mr. W. S. Scholl, Director of Personnel,
Louisville & Nashville Railroad Company,
908 W. Broadway,
Louisville 1, Kentucky

Dear Sir:

This will acknowledge your letter of August 26th, file L-306-11, in regard to money settlement due Fireman T. Y. Alston, Nashville Terminals, under N.R.A.B. First Division Award 17030.

As you already know Mr. Alston was the oldest man on the seniority list and consequently is entitled to the highest paid job and the job I understand that he is now holding. Therefore, it is not satisfactory to make a settlement with him of only 87.97% of what the job would have paid him.

The Board Award called for time lost and that, of course, meant the amount that the job would have paid him

Supplemental Affidavit of W. T. Wallace

had he been permitted to work and it would have been his prerogative to work full time had he so desired.

I would like to discuss the matter at your convenience.

Yours very truly,
(s) Jake Paschall,
General Chairman.

JP:IED

ORDER.

A hearing on pending motions was held in chambers on January 10, 1961 and there appeared Mr. John P. Sandidge, Mr. H. G. Breetz and Mr. M. D. Jones, for the plaintiff, and Mr. Charles I. Dawson and Mr. Edwin F. Schaeffer, for the defendants.

Counsel having been heard and the Court being advised,

IT IS ORDERED that the amended answer be filed.

IT IS FURTHER ORDERED that the defendant be given until Monday, January 16, 1961, to make specific objections to the findings of fact and conclusions of law as tendered by the plaintiff. Oral hearing on the objections is set for Tuesday, January 17, 1961, at 9:30 A.M.

January 10, 1961.

(s) Henry L. Brooks,
United States District Judge.

For the Plaintiff:
Mr. John P. Sandidge,
1805 Kentucky Home Life Bldg.,
Louisville, Kentucky,
Mr. H. G. Breetz,
Mr. M. D. Jones,
908 West Broadway,
Louisville, Kentucky.

For the Defendants:
Mr. Charles I. Dawson,
Mr. Edwin F. Schaeffer,
1700 Kentucky Home Life Bldg.,
Louisville, Kentucky.

APPENDIX

PART II

The original hereof was filed or entered and docketed Feb. 27, 1960

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee
Northeastern Division
Civil Action, File No. 1430.

Atlantic Coast Line Railroad Company, Etc., Et Al.,

v.

System Federation No. 44, Etc., Et Al.

ORDER GRANTING PRELIMINARY INJUNCTION.

This cause coming on this February 26, 1960, to be heard on the plaintiffs' motion for preliminary injunction, and due notice having been given to the defendants, and said hearing having been continued by the parties' stipulation and order entered thereon, and the Court having considered the evidence introduced by the parties, and the arguments of counsel for the plaintiffs in support of the motion, and of counsel for the defendants in opposition thereto, and being fully advised in the premises, it finds:

1. That the facts alleged in the complaint on file herein are essentially true:

2. That the defendant, International Association of Machinists, has threatened to strike and intends to strike

against the plaintiffs, solely because or on account of the plaintiffs' refusal to accept or non-compliance with Award No. 3132, Docket No. 2911, entered on March 16, 1959, by the Second Division of the National Railroad Adjustment Board, and pertaining to the dispute involving the defendant, Ted Harrison, and the order thereon, and without instituting and prosecuting to judgment an enforcement proceeding in the United States District Court as authorized and provided for in the Railway Labor Act, Title 45 USCA, Secs. 151 et seq. The other defendants intend to assist said defendant, International Association of Machinists, in such strike. Said strike, if it occurs, would cause immediate and irreparable injury, loss and damage to the plaintiffs in that the strike of the plaintiffs' employees as threatened will shut down the operations of the plaintiffs' interstate railroad and cause cessation of the movement of freight on plaintiffs' line and in interstate commerce, and will cause the plaintiffs to lose a large sum daily in revenue from freight, and will cause the plaintiff carriers to incur fixed charges in a large amount daily without any revenue, and will cause the plaintiffs to be forced to embargo incoming freight and suffer the loss of potential freight traffic over their lines and routes due to shippers being forced to make and effect other routings for handling their freight.

The Court concludes for the purpose of determining whether to issue a preliminary injunction pending full hearing of the issues in this action:

(1) That it has jurisdiction of the subject matter and parties to this action for the purposes pertaining to said preliminary injunction.

(2) That said preliminary injunction ought to issue as prayed in the complaint on file herein and as moved for in the motion.

Order Granting Preliminary Injunction

It is, therefore, ORDERED, ADJUDGED AND DECREED, that pending further order of this Court the defendants named in the complaint on file herein, and all persons in active concert or participation with them be, and they are hereby enjoined from carrying out the threat of strike or striking against the plaintiffs, solely because or on account of the plaintiffs' refusal to accept or non-compliance with the aforesaid award and order of the Second Division of the National Railroad Adjustment Board; and without institution and prosecution to judgment of an enforcement proceding in the United States District Court, authorized and permitted by the Railway Labor Act as aforesaid.

It is further ORDERED, ADJUDGED AND DECREED, that this order shall be effective from and after 12:30 P. M., February 26, 1960.

It is further ORDERED, ADJUDGED AND DECREED, that the plaintiffs file their bond, with corporate surety, in the sum of Fifty Thousand Dollars ($50,000.00), conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Pending further consideration and order, it is further ORDERED, ADJUDGED AND DECREED, that the motion of the sixteen named International Labor Organizations to quash the service of summons on them be, and the same is hereby, overruled at this time.

And on application of the defendants they are allowed twenty (20) days from February 26, 1960, within which to serve their answer in this action.

Dated February 26, 1960.

Approved for entry:

(s) John W. Delehant,
United States District Judge.

(s) Cox, Epps, Powell & Welles,
Attorneys for Plaintiffs.
(s) Milton Kramer,
(s) John R. Jones,
Attorneys for Defendants.

Attest:
A True copy.
Certified this Aug 12 1960
James W. Parrott, Clerk,
By: (s) Sallie M. Cochran,
Deputy Clerk.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 14,191

SYSTEM FEDERATION NO. 44 OF THE RAILWAY EMPLOYEES' DEPARMENT OF THE AFL-CIO, ET AL., - - - - APPELLANTS,

V.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., - - - - APPELLEES.

STIPULATION FOR DISMISSAL OF APPEAL AND DISPOSITION OF ACTION.

WHEREAS, this case is an appeal by the appellants to this Court from an order entered February 27, 1960 in the United States District Court, awarding a preliminary injunction, enjoining the appellants from carrying out the treat of strike or striking against the appellees, solely because or on account of appellees refusal to accept a noncompliance with Award No. 3132, Docket No. 2911, entered March 16, 1959, by the Second Division of National Railroad Adjustment Board and pertaining to the dispute involving the appellant, Ted Harrison, and the order thereon, without institution and prosecution to judgment of an enforcement proceeding in the United States District Court, as authorized and permitted by the Railway Labor Act; and,

WHEREAS, on August 31, 1960, and after the filing and docketing of the record on appeal in this case, System Federation No. 44 of the Railway Employees' Department of the AFL-CIO and others, as plaintiffs or petitioners instituted and commenced in the United States District Court for the Eastern District of Tennessee, Northeastern Divi-

sion, against the appellees, as defendants or respondents, a proceeding, the same being Civil Action No. 1478 on the Docket of said United States District Court, for the enforcement of the aforesaid award and order, in which the appellees, as defendants or respondents, filed September 30, 1960, a counter claim against the plaintiffs therein seeking to have said award and order set aside, and which original proceeding and counter proceeding remains pending and undisposed of in said United States District Court;

NOW, THEREFORE, in the above entitled and numbered case it is hereby stipulated and agreed by and between the appellants, System Federation No. 44 of the Railway Employees' Department of the AFL-CIO and others, and the appellees, Atlantic Coast Line Railroad Company and another, as is evidenced by the signatures hereto of their respective attorneys, as follows:

1. That the appellants hereby agree and bind themselves, jointly and severally, to the appellees that neither the appellants nor any of them will strike against the appellees, solely because or on account of the appellees' refusal to accept or non-compliance with the aforesaid award and order of the Second Division of the National Railroad Adjustment Board, so long as the above mentioned orginal enforcement proceeding, subsequently commenced and now pending undisposed of in the United States District Court, as aforesaid, has not been prosecuted to final and ultimate judgment on the merits.

2. That the appellants hereby release, discharge and acquit the appellees and the sureties on their bonds for temporary restraining order and for preliminary injunction, of and from any and all obligations and liabilities upon or under said bonds, and also hereby waive and renounce, in favor of the appellees, all claims for damages

on account of the temporary restraining order, and or preliminary injunction previously awarded in this case.

3. That the appellants hereby dismiss their appeal in this case, without costs for or against either party.

4. That in consideration of the above, the appellees agree and bind themselves, jointly and severally, to the appellants, that on return of this case to the United States District from whence it was appealed and appellees will dismiss without prejudice their action in the United States District Court, without cost for or against either party.

5. That this stipulation shall be filed in the United States Court of Appeals in this case as part of the record herein.

6. That the necessary order shall be entered in the United States Court of Appeals in this case upon this stipulation to effect the dismissal of the appeal and return of this case to the United States District Court from whence it was appealed, and upon return of the case to said United States District Court, together with a copy of the order dismissing the appeal and of this stipulation, the necessary order shall be entered in the United States District Court dismissing without prejudice the appellees' action against the appellants, as hereinbefore agreed.

Dated this the 12th day of November, 1960.

(s) Milton Kramer,
Attorneys for Appellants,
By Lester P. Schoene

(s) A. K. McIntyre,
(s) Ferdinand Powell, Jr.,
Attorneys for Appellees.

Filed Nov. 28, 1960
Carl W. Reuss, Clerk

NO. 14,191

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYSTEM FEDERATION NO. 44 OF THE RAILWAY EMPLOYEES' DEPARTMENT OF THE AFL-CIO, ET AL., - - - Appellants,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, et al., - - - - - - - Appellees.

ORDER.

Pursuant to stipulation of counsel it is ordered that this appeal be and it is dismissed.

Approved for entry:

(s) Paul C. Weick,
United States Circuit Judge.

CERTIFICATE OF SERVICE.

I, H. G. Breetz, one of the attorneys for Plaintiff-Appellee, hereby certify that on the ____ day of _____, 1961, I served copies of the foregoing Appendix to Brief of Plaintiff-Appellee on the several parties by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Charles I. Dawson,
Edwin F. Schaeffer, Jr.,
Bullitt, Dawson and Tarrant,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky.

Harold C. Heiss,
Russell B. Day,
Keith Building,
Cleveland 15, Ohio.

Harold N. McLaughlin,
1706 Union Commerce Building,
Cleveland 14, Ohio.

V. C. Shuttleworth,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa.

Wayland K. Sullivan,
Standard Building,
Cleveland 14, Ohio.

H. G. BREETZ

[fol. 311] [File endorsement omitted]

No. 14486

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff-Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky.

OPINION—Decided December 18, 1961.

Before Martin and Cecil, Circuit Judges; Darr, District Judge.

Per Curiam. This is an appeal by the Brotherhood of Locomotive Engineers, the other three Railroad Brotherhoods, and certain individuals, from an injunction against the Brotherhoods enjoining them from carrying out the threat of a strike against the carrier, solely because of the carrier's refusal to comply with an order of the National Railroad Adjustment Board to enforce a money award in favor of a railroad employee. In its award, the Adjustment Board stated as to the award: "Claim sustained with pay for time lost as the rule is construed on the property." The dispute between the Brotherhoods and the Railroad was as to whether or not the employee was entitled to his wages lost while he was laid off by the carrier without deducting his outside earnings during such period.

[fol. 312] When the carrier applied to the Board for an interpretation of its decision, the Board was ever divided,

necessitating the decision of an appointed Referee to break the deadlock. The decision of the Referee adopted the contention advanced by the Brotherhood of Locomotive Firemen and Enginemen, as follows: "The above numbered award sustained a claim for reinstatement of claimant to service with pay for time lost as the rule is construed on the property.

"In its request for interpretation carrier asserts that a dispute exists between the parties as to the proper application of the award in that carrier asserts and the organization denies that outside earnings during the period laid out of service should be deducted in computing pay for time lost. Wherefore carrier seeks to have the Division determine that dispute as an interpretation of its award.

"Facts and supporting data as to that issue were not included in the docket on which Award 18720 was predicated, the issue here raised was not submitted to the Division for determination, and we may not determine a new issue in the guise of an interpretation of the issue formerly decided. See Award 17500 and 'interpretation' thereof."

The carrier ultimately felt forced to file an injunction suit against a strike by the Brotherhoods over this controversial issue.

We find no merit in appellants' argument that the record reveals that appellee comes into court with unclean hands. Moreover, the dispute between the laid-off fireman, Humphries, and his Brotherhood on the one hand, and the Railroad on the other, involving his claim, is a "minor dispute." In such instance, we think the United States Courts have jurisdiction and power to issue necessary injunctive orders to vindicate the processes of the Railway Labor Act. See *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R. Co.*, 353 U. S. 30.

District Judge Brooks filed comprehensive findings of fact, all supported by substantial evidence and not clearly erroneous, and well-reasoned conclusions of law, in which this court concurs.

Accordingly, the judgment of the United States District Court is affirmed.

[fol. 313] [File endorsement omitted]

[fol. 314]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14,486

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff-Appellee,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,
Defendants-Appellants.

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING, AND FOR CLARIFICATION AND EXTENSION OF THE OPINION—Filed December 26, 1961

This document is not filed with either the hope or the expectation that this Court will recede from its order affirming the judgment of the lower court.

However, the Opinion of this Court leaves defendants-appellants and their counsel completely in the dark as to whether or not this Court intended to decide this case on the ground that the National Railway Labor Act precludes all strikes in respect of minor labor disputes irrespective of whether the strike is for the purpose of bringing economic pressure upon the railroad to recede from its refusal to comply with an order of the Railroad Adjustment Board in favor of the employee, or for some other purpose; and [fol. 315] whether or not by its Opinion, this Court intended to also hold that the Railway Labor Act makes the enforcement suit provided for by Section 3, First (p) of the Railway Labor Act (45 U. S. C. A., Section 153, First (p)) the exclusive remedy and the only recourse available to an employee and his union when the railroad refuses to comply with an award in favor of the employee; in other words, whether the enforcement suit provided for by the

Act precludes a strike to enforce an award by the Railroad Adjustment Board.

We suggest that the Brotherhoods are entitled to a specific decision of this Court on these questions, as they were the sole grounds on which the Railroad justified the injunction of the lower court.

The Brotherhoods contemplate an application to the Supreme Court for a writ of certiorari to review the action of this Court in the above entitled case. Therefore, certainly, this Court should make it clear whether it intended to hold that the provisions of the National Railway Labor Act outlaws all strikes in minor labor disputes between the railroad and its employees, and, also, whether it was intended to hold that the enforcement suit provided by Section 3, First (p) of the Railway Labor Act precludes a strike to enforce such an award.

We do not feel that the per curiam Opinion's adoption of the conclusions of law of the lower court satisfies the situation here presented. To begin with, it was rather startling to read in the Opinion this language:

> [fol. 316] "District Judge Brooks filed *comprehensive findings of fact, all supported by substantial evidence and not clearly erroneous, and well-reasoned conclusions of law, in which this court concurs.*" (Emphasis added.)

The opinion of the lower court entitled "Order" will be found at page 98a of the Appendix to the Brief of Defendants-Appellants and reads as follows:

> "This action is submitted on the record and the briefs of the parties have been considered.
>
> "The case of The Denver and Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen, et al., No. 6796, decided July 27, 1960, by the United States District Court for the District of Colorado, and the authorities cited in that opinion by Judge Chilson required that the preliminary injunction granted in this action be made permanent.
>
> "It Is Therefore Ordered that counsel for plaintiff Louisville and Nashville Railroad Company, submit

detailed findings of fact and conclusions of law and tender judgment. December 20, 1960."

It will be observed that the district judge's opinion did no more than announce his conclusion that he had jurisdiction to enjoin the threatened strike. That so-called "order" gave no clue whatever as to what the district judge considered the proven facts to be, nor did it contain any discussion whatever of the Railway Labor Act or of any legal principle applicable thereto. In effect, it ordered and [fol. 317] authorized counsel for the Railroad to submit findings of fact gathered from the record and conclusions of law which counsel thought would support the ultimate conclusions of the court, and that is exactly what was done. Counsel for the Railroad merely submitted the substance of their arguments and briefs. When those findings of fact and conclusions of law were submitted to the district judge, he accepted same with scarcely the dotting of an "i" or the crossing of a "t". In view of those facts, it is incongruous for this Court to refer to the conclusions of law of the lower court as "well-reasoned conclusions of law."

We think this Court fully appreciates that under Supreme Court Rule No. 19, a review of this Court's action very likely will depend upon whether or not this Court

(1) "has decided an important question of federal law which has not been, but should be, settled by this court";

or

(2) "has decided a federal question in a way in conflict with applicable decisions of this court."

Our feeling is that the Opinion of this Court meets both of those tests, but it does not say so. If this Court intended to decide that all strikes in respect of minor labor disputes in the railroad industry are prohibited by the Railway Labor Act, then, we believe that conclusion falls under (2) above in that the conclusion would be in conflict with [fol. 318] the applicable decisions of the Supreme Court on the subject. If this Court intended to decide that the en-

forcement suit provided by the Act precludes strikes in respect of an award with which the railroad refuses to comply, then, that conclusion is on an important feature of the Railway Labor Act which has not been, but should be, settled by the Supreme Court, and falls within (1) above.

When the Brotherhoods make application for writ of certiorari, they should not be required to speculate about what the court decided on those two questions, nor should we be required to ask the Supreme Court to speculate on just what the Opinion of this Court means. Surely, this Court will not be willing to leave the Brotherhoods in such a dilemma. The Opinion should be so clear on the two points above referred to that it will need no interpretation when application is made for writ of certiorari.

Premises considered, the Court is respectfully asked:

(1) to grant a rehearing;

(2) on such rehearing, to set out—if such be the fact—that the Court intended to decide either

(a) that the Railway Labor Act prohibits all strikes in minor labor disputes, or

(b) that under the statute the enforcement suit provided thereby precludes a strike to enforce an award made by the Railroad Adjustment Board to an employee, or

[fol. 319] (c) that it was intended to decide both of those questions in favor of the Railroad.

Respectfully submitted,

Chas. I. Dawson, Edwin F. Schaeffer, Jr., Bullitt, Dawson & Tarrant, 1700 Kentucky Home Life Building, Louisville 2, Kentucky, Counsel for Defendants-Appellants.

Of Counsel:

Harold C. Heiss, Keith Building, Cleveland 15, Ohio, General Counsel for Brotherhood of Locomotive Firemen and Enginemen,

Russell B. Day, Keith Building, Cleveland 15, Ohio, Counsel for Brotherhood of Locomotive Firemen and Enginemen,

Harold N. McLaughlin, 1706 Union Commerce Building, Cleveland 14, Ohio, General Counsel for Brotherhood of Locomotive Engineers,

V. C. Schuttleworth, 1120 Merchants National Bank Building, Cedar Rapids, Iowa, General Counsel for Order of Railway Conductors and Brakemen,

Wayland K. Sullivan, Standard Building, Cleveland 14, Ohio, General Counsel for Brotherhood of Railroad Trainmen.

[fol. 320] The undersigned counsel for Defendants-Appellants states that the foregoing Petition for Rehearing and for Clarification and Extension of the Opinion is presented in good faith and not for purposes of delay.

This December 22, 1961.

Chas. I. Dawson

[fol. 321]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING, ETC.—
January 17, 1962

The petition for rehearing, and for clarification and extension of the opinion, filed by the Defendants-Appellants, is denied.

Enter:

John D. Martin, United States Circuit Judge.

[fol. 322] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 323]

SUPREME COURT OF THE UNITED STATES

No. 868, October Term, 1961

BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al., Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—June 4, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.